Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

Whether state law damages claims for pesticide-related agricultural crop injury are pre-empted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y (2000), where the claims seek to hold a pesticide manufacturer liable for advertising statements that repeat the information contained on nationally uniform product labeling that has been approved by the United States Environmental Protection Agency ("EPA").

Whether FIFRA pre-emption of labeling-related damages claims is limited to the specific subjects that EPA reviews at the time it first approves a pesticide product's labeling.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner American Cyanamid Company is a wholly owned subsidiary of Wyeth. No other publicly held company owns 10% or more of Petitioner's stock.

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OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 79 S.W.3d 21 (Tex. 2002), and is reproduced in Appendix A at 1a. The opinion of the 11th Court of Appeals, Eastland, Texas, which the state supreme court affirmed, is reported at 32 S.W.3d 916 (Tex. Ct. App. 2000), and is reproduced in Appendix B at 15a. The state district court's unpublished final judgment granting summary judgment in favor of Petitioner, which the state court of appeals reversed, is reproduced in Appendix C at 25a. The district court's letter opinion, which preceded its final judgment, is reproduced in Appendix C at 27a.

JURISDICTION

The Texas Supreme Court's decision was rendered on June 6, 2002. This Court has jurisdiction under 28 U.S.C. § 1257 because the Texas Supreme Court's federal pre-emption opinion below is a "final judgment" within the meaning of 28 U.S.C. § 1257. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483-84 (1975).

There are "at least four categories of . . . [state supreme court] cases in which the Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477. The Court has found jurisdiction appropriate in such cases because "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.' " *Id.* at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

Under the fourth category of cases recognized in *Cox*, a state court decision is final for purposes of § 1257

> where the federal issue has been *finally decided* in the state courts with further proceedings pending [and] where *reversal of the state court on the federal issue would be preclusive of any further litigation* on the relevant cause of action rather than merely controlling the nature and character of, or determining admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision *might seriously erode federal policy*, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83 (emphasis added). *Accord Florida v. Thomas*, 532 U.S. 774, 777, 780 (2001); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-57 (1989); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988).

The Texas Supreme Court's opinion falls squarely within the foregoing category of cases, and therefore, it is a "final judgment" under § 1257. The federal pre-emption issue addressed in the opinion – whether pesticide labeling-related state law damages claims for agricultural crop injury are pre-empted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") – has been finally determined by the Texas Supreme Court for purposes of the state litigation. The state supreme court held that FIFRA does not pre-empt such claims, and remanded the case to the trial court. There is nothing that the trial court now could do that would affect the Texas Supreme Court's ruling that Respondents' labeling-related crop injury claims are not pre-empted.

As a result, reversal of the Texas Supreme Court's federal pre-emption opinion would be "preclusive of any further litigation on the relevant cause[s] of action." *Cox*, 420 U.S. at 482-83. If this Court were to reverse the opinion below and hold that labeling-related crop injury claims are

pre-empted by FIFRA, Petitioner American Cyanamid Company would be entitled to judgment on Respondents' state law claims since, as the state courts found, they "[a]ll . . . relate directly or indirectly to the product label." App. B at 16a. In other words, given that *all* of Respondents' claims are labeling-related, the federal pre-emption question addressed by the Texas Supreme Court is dispositive of this case.

Furthermore, "a refusal immediately to review" the Texas Supreme Court's ruling would "seriously erode [the] federal policy" underlying the federal pre-emption issue in this case. *Cox*, 420 U.S. at 483. That federal policy is Congress' mandate that every FIFRA-registered pesticide product be accompanied by its own nationally uniform product labeling regulated *solely* by EPA, and not by the States. *See* 7 U.S.C. § 136v(b) ("Uniformity"). Unless reviewed and reversed by this Court, the Texas Supreme Court's decision will erode that federal policy by allowing individual Texas state court juries to destroy national labeling uniformity through imposition of damages awards for labeling-related crop injury claims, and potentially for other types of labeling-related claims as well.

As in *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983), the state supreme court "finally disposed of the federal pre-emption issue; a reversal here would terminate the state-court action; and to permit the proceedings to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding" federal policy. Thus, the Texas Supreme Court's opinion is a "final judgment" for purposes of § 1257.

STATUTES AND REGULATIONS INVOLVED

7 U.S.C. § 136v(b) provides as follows:

> **Uniformity.**
>
> Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136a(c)(5) provides in pertinent part as follows:

> **Approval of registration**
>
> . . . In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy.

The texts of 40 C.F.R. §§ 158.540(b)(1) and 158.640(b)(1) are set forth in Appendix D.

STATEMENT OF THE CASE

This state law damages suit involves agricultural crop injury allegedly caused by a "tank mix" (i.e., an on-the-farm combination) of two herbicides (i.e., weed control pesticides), which were manufactured by Petitioner American Cyanamid Company ("Cyanamid"). Respondents, Texas peanut growers, allege that the combination of the two products, Pursuit and Prowl, was phytotoxic (i.e., poisonous) to their 1993 crop. According to Respondents, the tank mix stunted the roots of their young peanut plants; the plants

yellowed rather than developed healthy foliage; and they produced substantially less peanuts than normal plants. Respondents do not contend that the herbicides were ineffective in controlling weeds that interfere with peanut crops.

Both herbicides were granted registrations by the United States Environmental Protection Agency ("EPA") pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (2000), the comprehensive federal pesticide statute. Cyanamid distributed both herbicides with nationally uniform product labeling approved by EPA pursuant to that statute. The EPA-approved labeling for Pursuit *specifically stated that the product can be tank mixed with Prowl* to control certain types of weeds that interfere with peanut crops.

Respondents allege that they relied upon Cyanamid magazine advertisements and brochures which indicated that Pursuit can be tank mixed with Prowl for use on peanut crops. Their Third Amended Petition in the Eastland, Texas state district court includes causes of action against Cyanamid for breach of express and implied warranties, strict liability, and violation of the Texas Deceptive Trade Practices Act.

Cyanamid moved for summary judgment on several grounds, including that § 136v(b) of FIFRA, which expressly prohibits the States from imposing "any requirements for labeling" that are "in addition to or different from" the labeling requirements imposed under FIFRA by EPA, pre-empts all of Respondents' claims. 7 U.S.C. § 136v(b). A substantial, nationwide body of federal and state case law holds that § 136v(b) expressly pre-empts state law damages claims that directly or indirectly implicate the adequacy or accuracy of the information contained on EPA-approved pesticide labeling. *See, e.g., Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *Etcheverry v. Tri-Ag Serv., Inc.*,

993 P.2d 366 (Cal. 2000); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995).

The district court found that Cyanamid is "entitled to summary judgment as a matter of law as to each of plaintiffs' claims as those claims are directly or indirectly related to the product's labeling and therefore preempted by FIFRA." App. C at 28a. Accordingly, the district court entered final judgment dismissing the suit on the ground of FIFRA pre-emption. *Id.* at 25a.

Respondents appealed to the 11th Court of Appeals, Eastland, Texas. The court of appeals agreed that "[a]ll of plaintiffs' state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." App. B at 16a. Moreover, the court found that the "off-label" advertising statements on which Respondents base their claims "*merely repeated information on the labels*." *Id.* at 16a, n.2 (emphasis added). The court of appeals held, however, "that plaintiffs' state law claims relating directly or indirectly to labeling are not preempted by FIFRA because such claims involve the efficacy of the products and not the risks to humans and the environment posed by the use of the product." *Id.* at 24a. As a result, the court of appeals reversed the district court's final judgment and remanded the case.

Cyanamid appealed to the Supreme Court of Texas. After requesting and receiving briefs on the merits of the FIFRA pre-emption issue, the state supreme court granted review. Cyanamid argued both that § 136v(b) of FIFRA expressly pre-empts Respondents' labeling-related damages claims, and also that the claims are barred under the doctrine of implied conflict pre-emption. Respondents contended that their claims are not pre-empted, and alternatively, that the trial court and court of appeals erred in holding that all of their claims are labeling-related.

The Texas Supreme Court held in *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819, 820 (Tex. 1995), that "FIFRA preempts all common law tort suits against manufacturers of EPA-registered pesticides which are based solely upon claims relating directly or indirectly to labeling." In its opinion below, however, the court distinguished *Quest* on the ground that it "involved a claim for personal injury while this case involves a claim for target crop damage." App. A at 13a. "[A]cknowledg[ing] that many jurisdictions that have considered this issue have reached the opposite result," the Texas Supreme Court held that § 136v(b) of FIFRA does not pre-empt labeling-related damages claims involving agricultural crop injury. *Id.* at 12a. According to the court,

> it is not the breadth of preemption, but rather the breadth of the congressionally created exception to express preemption that determines the outcome.
>
> . . . Congress has dictated that state actions regarding product labeling are preempted to the extent that the content of the product label is regulated. But Congress has permitted its regulatory body, the Environmental Protection Agency, to choose NOT to regulate product labeling with respect to how well a product works, that is, the product's "efficacy." Central to this case, the EPA has also chosen to define product efficacy to include "target area phytotoxicity," that is, the effect of a particular product or combination of products on the crops that are deliberately sprayed. Simply put, the EPA does not regulate herbicide labels regarding how well a product works, and this includes if the product actually injures the crops it was intended to assist. Because of the EPA's choice not to regulate, and therefore because there are no labeling or packaging requirements regarding crop damage imposed under

> FIFRA, we conclude that state common-law claims about target area crop damage are not preempted.

App. A at 1a-2a. Thus, the Texas Supreme Court affirmed the court of appeals' judgment that FIFRA does not pre-empt Respondents' claims. The state supreme court did not disturb the findings of the court of appeals and trial court that all of Respondents' claims are directly or indirectly related to the herbicide products' EPA-approved labeling. Nor did the state supreme court consider whether the claims are impliedly pre-empted.

REASONS FOR GRANTING THE PETITION

I. THE TEXAS SUPREME COURT'S OPINION THAT FIFRA DOES NOT PRE-EMPT PESTICIDE LABELING-RELATED DAMAGES CLAIMS INVOLVING AGRICULTURAL CROP INJURY DIRECTLY CONFLICTS WITH THE OPINIONS OF THE CALIFORNIA SUPREME COURT AND THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

This case raises the important, frequently recurring federal question of whether FIFRA pre-empts state law agricultural crop injury claims which seek to impose liability upon pesticide manufacturers for distributing pesticides with, or making advertising or promotional statements that repeat the information on, EPA-approved product labeling.

California and Texas are the nation's two leading agricultural producers.[1] The agricultural economies of both

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[1] California and Texas, respectively, are the leading two states in farm receipts and market value of agricultural products sold. *See* Caroline S. Gleaton & Carl G. Anderson, *Facts About Texas and U.S. Agriculture*, Texas Cooperative Extension, Dept. of Agricultural Economics, The

(Footnote cont'd on next page.)

of those states, as well as other states, depend upon the availability of a wide variety of herbicides, insecticides, fungicides, and other types of pesticides essential to crop production. As a result of the opinion below, however, the Texas and California supreme courts now are irreconcilably split on the issue of whether pesticide manufacturers can market FIFRA-registered pesticides without being subjected to failure-to-warn or other labeling-related state law damages claims for agricultural crop injury allegedly caused by use of pesticides in the manner required or authorized by their EPA-approved labeling. This direct conflict between the highest courts of the nation's two most important agricultural states creates significant legal uncertainty and unpredictability which could lead to serious adverse economic consequences for farmers and the public as well as pesticide manufacturers.

In *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366 (Cal. 2000), a case analogous to this one, California walnut growers alleged that their 1993 crop was injured due to the phytotoxic effect of a tank mix combination of two FIFRA-registered insecticides, whose EPA-approved labeling contained no warnings against applying the products together. The California state trial court held that FIFRA pre-empted the claims, and the state court of appeal reversed. On review, the California Supreme Court held that "[w]hen a claim, however couched, boils down to an assertion that a

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(Footnote cont'd from previous page.)

Texas A&M University System (April 2002); U.S. Dept. of Agriculture, 1997 Census of Agriculture, Ranking of States and Counties, Vol. 2, May 1999, at 1. In 1997, the market value of agricultural products in California was over $23 billion, and in Texas over $13 billion. 1997 Census of Agriculture at 27.

pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA." *Id.* at 377. In reaching this conclusion, the California Supreme Court found that "[t]he federal court decisions holding that FIFRA preempts state law failure-to-warn claims are numerous, consistent, pragmatic and powerfully reasoned." *Id.* at 368.[2]

Like Respondents here, the plaintiffs in *Etcheverry* argued that § 136v(b) does not pre-empt state damages claims involving phytotoxic crop injury. Unlike the Texas Supreme Court, however, the California Supreme Court rejected that contention. *See Etcheverry*, 993 P.2d at 374-76. More specifically, the *Etcheverry* court found, *inter alia,* that EPA's so-called efficacy data waiver (which normally waives the submission of efficacy data – in other words, product effectiveness data – at the time an agricultural pesticide is first registered), is "beside the point" since "[p]hytotoxicity is not a matter of efficacy." *Id.* at 375. In

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[2] Indeed, all nine federal circuits that have considered the subject in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (holding that a federal statutory prohibition against state-imposed requirements encompasses requirements imposed through state damages claims), have held that § 136v(b) of FIFRA expressly pre-empts failure-to-warn and other labeling-related damages claims. *See, e.g., Netland v. Hess & Clark Inc.*, 284 F.3d 895 (8th Cir. 2002), *petition for cert. filed* (U.S. Aug. 9, 2002) (No. 02-219); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995) (*citing Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993)); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

contrast, the Texas Supreme Court's opinion is *predicated* on the efficacy data waiver. *See* App. A at 6a (asserting that EPA's efficacy data waiver is "[e]ssential to this case").

Equally important, the Texas Supreme Court's opinion also directly conflicts with the Fifth Circuit's case law on FIFRA pre-emption of state damages claims for agricultural crop injury. In *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999), the plaintiff alleged that a FIFRA-registered herbicide not only failed to control a particular type of weed, but also caused significant phytotoxic damage to his 1995 rice crop. The U.S. Court of Appeals for the Fifth Circuit held that § 136v(b) of FIFRA pre-empts all of the plaintiff's crop injury claims. The court found that the plaintiff's claims were based on the contents of the herbicide's EPA-approved labeling, and thus, "any adverse judgment would have the 'undeniable practical effect' of imposing additional labeling standards on [the manufacturer]." *Id.* at 399 (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994)). Moreover, the Fifth Circuit found that the plaintiff " 'cannot automatically avoid FIFRA preemption simply because [he] challenge[s] alleged misrepresentations that were made separately from the label' . . . even off-label statements are preempted if they merely repeat information contained in the label." *Id.* at 400 (quoting *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997)). *Accord Etcheverry*, 993 P.2d at 377.

The opinion below takes issue with *Etcheverry, Andrus,* and other crop injury cases decided by what the Texas Supreme Court conceded are the "many jurisdictions that have . . . reached the opposite result." App. A at 12a. Indeed, of the nine federal circuits which have held in light of *Cipollone* that § 136v(b) pre-empts labeling-related damages claims (*see supra*, n.2), five have applied that principle to labeling-related crop injury claims, and none have held that such claims are excluded from pre-emption.

See Andrus, 178 F.3d 395 (5th Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Welchert v. American Cyanamid Co.*, 59 F.3d 69 (8th Cir. 1995); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993).

Furthermore, in addition to the California Supreme Court's opinion in *Etcheverry*, the highest courts of several other heavily agricultural states also have held that § 136v(b) pre-empts crop injury claims insofar as they implicate a pesticide's EPA-approved labeling. *See, e.g., Kawamata Farms, Inc. v. United Agri Prods.*, 948 P.2d 1055 (Haw. 1997); *Wright v. Cropmate Co.*, 599 N.W.2d 668 (Iowa 1999); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Pfeifer v. E.I. du Pont de Nemours & Co.*, 606 N.W.2d 773 (Neb. 2000); *Eide v. E.I. du Pont de Nemours & Co.*, 542 N.W.2d 769 (S.D. 1996); *Hue v. Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995); *see also Barnes v. Sandoz Crop Prot. Corp.*, 938 P.2d 95 (Ariz. Ct. App. 1997); *M & H Ent. v. Tri-State Delta Chems., Inc.*, 984 S.W.2d 175 (Mo. Ct. App. 1998); *but see Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042, 1053 (Mont. 2000), *cert. denied* 122 S. Ct. 40 (2001) (personal injury case overruling prior crop injury decision in *McAlpine v. Rhone-Poulenc Ag Co.*, 947 P.2d 474 (Mont. 1997), on ground that § 136v(b) does not pre-empt *any type* of labeling-related state damages claim); *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746, 755 (Wis. 1995).

Here, as the Texas Court of Appeals explained, "[a]ll of plaintiffs' state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." App. B at 16a. If this or a similar case had been brought in a California state court, all labeling-related crop injury claims would be held pre-empted. *See Etcheverry*, 993 P.2d at 374-78. Likewise, if a Texas federal

district court were called upon to review such claims, they would be held pre-empted. *See Andrus*; *see also Dow AgroSciences, LLC v. Bates*, 205 F. Supp. 2d 623 (N.D. Tex. 2002), *appeal docketed*, No. 02-10908 (5th Cir. Aug. 16, 2002) (declaratory judgment action holding based on *Andrus* that FIFRA pre-empts the labeling-related damages claims of numerous Texas farmers who allege that their peanut crops were injured due to the plaintiff manufacturer's allegedly ineffective peanut herbicide). But unless the Texas Supreme Court's opinion below is reversed, labeling-related crop injury claims will *not* be held pre-empted in Texas state courts, where the vast majority of Texas crop injury suits are filed. Instead, pesticide manufacturers such as Cyanamid will be subjected to trial, and potentially large damages awards, merely for making promotional statements that repeat the information on their products' EPA-approved labeling (such as the information that one herbicide can be tank mixed with another for use on a particular crop).

The Texas Supreme Court's opinion creates an intolerable conflict which warrants this Court's immediate review. To be sure, there is no widespread split of authority regarding, or need for this Court to review, the fundamental principle that § 136v(b) of FIFRA expressly pre-empts state damages claims, such as failure-to-warn claims, that implicate the adequacy or accuracy of the information contained on EPA-approved product labeling.[3] This Court should resolve, however, the conflict created by the Texas Supreme Court's opinion below on the significant issue of whether labeling-related damages claims that involve

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[3] The certiorari petition pending in *Netland v. Hess & Clark Inc.*, No. 02-219, asserts that the Court should review this fundamental, widely accepted FIFRA pre-emption principle.

agricultural crop injury somehow are excluded from § 136v(b)'s pre-emptive scope.

II. THE TEXAS SUPREME COURT'S OPINION IS PREDICATED ON A FUNDAMENTAL MIS-INTERPRETATION OF FIFRA WHICH SERIOUSLY UNDERMINES CONGRESS' UNEQUIVOCAL MANDATE THAT NATIONALLY UNIFORM PESTICIDE LABELING BE REGULATED SOLEY BY THE FEDERAL EPA, AND NOT BY THE STATES

A. The Texas Supreme Court's Opinion Is Based On An Erroneous Interpretation Of § 136v(b)

FIFRA is a "comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984) (discussing FIFRA's statutory scheme). Under the federal/state "regulatory partnership" established by FIFRA, the States share responsibility with the federal EPA for regulating the sale and use of pesticides, but pesticide "labeling . . . fall[s] within an area that FIFRA's 'program' pre-empts." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 615 (1991); *see* 7 U.S.C. § 136v ("Authority of States"). Congress intended FIFRA's pre-emption provision, § 136v(b), "to completely preempt State authority in regard to labeling," and thereby to establish a system of nationally uniform product labeling regulated solely by EPA. H.R. Rep. No. 92-511, at 16 (1971). Except for the addition of the title "Uniformity" in 1988, § 136v(b) has remained unchanged since its enactment in 1972, when Congress

"significantly strengthened FIFRA's registration and labeling standards." *Mortier*, 501 U.S. at 601.[4]

Section 136v(b) is a broad, self-operating pre-emption provision, and it contains no exceptions: Imposition of "*any*" state requirements for labeling "in addition to or different from" EPA's labeling requirements is expressly pre-empted. 7 U.S.C. § 136v(b) (emphasis added). Accordingly, as the California Supreme Court explained in *Etcheverry*, "Congress did not give the EPA [a] role in implementing" § 136v(b) or "in determining the scope of preemption under" it. 993 P.2d at 373 (citing *Kuiper v. American Cyanamid Co.*, 960 F. Supp. 1378, 1384 (E.D. Wis. 1997), *aff'd* 131 F.3d 656 (7th Cir. 1997)). As a result, nothing in FIFRA authorizes EPA to promulgate regulations, publish guidelines, or adopt policies, that have the effect of limiting, or creating exceptions to, § 136v(b). *Id.* at 373-74.

According to the Texas Supreme Court's opinion below, however, "EPA regulations define 'the domain expressly pre-empted' " by § 136v(b). App. A at 4a (quoting *Cipollone v. Liggett Group,* 505 U.S. at 517). Much of the Texas Supreme Court's opinion is devoted to a discussion of

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[4] Every pesticide product not only must be granted a registration by EPA pursuant to FIFRA, but also must be distributed with EPA-approved product labeling. *See* 7 U.S.C. § 136a ("Registration of Pesticides"); *see also id.* § 136j(a)(2)(A) (making it unlawful to alter EPA-approved labeling); 40 C.F.R. § 152.130(a) ("Distribution under approved labeling"). Before registering a pesticide product, EPA must determine that "its labeling . . . compl[ies] with the requirements of [FIFRA]," and that the product, when applied in accordance with its labeling, "will perform its intended function without unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5). "The term 'environment' includes water, air, land, and *all plants* and man and other animals living therein, and the interrelationships which exist among these." *Id.* § 136(j) (emphasis added).

EPA's waiver of efficacy data (i.e., product effectiveness data) pursuant to 7 U.S.C. § 136a(c)(5) at the time a pesticide product is first registered, and why "target area phytotoxicity" supposedly is included within that partial waiver. *Compare Etcheverry*, 993 P.2d at 374-76 (discussing why phytotoxicity and efficacy are "distinct concepts," and thus, why the efficacy data waiver is "irrelevant"). Based on EPA's efficacy data waiver, the Texas Supreme Court concluded as follows:

> Because the EPA does not evaluate whether a product will be toxic to the crops that it was intended to assist, the EPA does not regulate a product's labeling claims on this subject. Because the scope of FIFRA's preemption is dependent on what the EPA regulates, FIFRA does not preempt [Respondents'] common law crop-damage claim.

App. A at 14a.

There are glaring flaws with this reasoning.

First, the opinion below is predicated on the Texas Supreme Court's erroneous notion that "Congress has dictated that state actions regarding product labeling are preempted *to the extent that the content of the product label is regulated*." *Id.* at 1a (emphasis added). There is no statutory basis for this assertion, or for the court's declaration that "without EPA regulation, there can be no preemption." *Id.* at 13a. Nothing in FIFRA provides that there must be a specific EPA labeling requirement on a particular subject (e.g., prevention of target area phytotoxicity) in order for § 136v(b) to pre-empt the States from imposing their own labeling requirements on that subject. Instead, the plain, broad language of § 136v(b) not only pre-empts "any" state requirements for labeling that are "different from," but also "any" that are "*in addition to,*" those required under FIFRA by EPA. 7 U.S.C. § 136v(b) (emphasis added). As a result, regardless of what particular

subjects EPA's labeling requirements encompass, § 136v(b) expressly preempts the States from adding their own labeling requirements, including by means of state damages awards. *See Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1308 (4th Cir. 1992) (construing "the prohibition against state labeling requirements 'in addition to' those in FIFRA to preempt the imposition of categories of labeling restrictions not provided by the federal law"). In other words, consistent with Congress' goal of national labeling uniformity, § 136v(b) expressly pre-empts the States from filling any supposed gaps in EPA's regulation of pesticide labeling.[5]

Second, contrary to the Texas Supreme Court's opinion below, the so-called "efficacy data waiver" included within § 136a(c)(5) of FIFRA is not some sort of exemption from, or exception to, § 136v(b). *See Etcheverry,* 993 P.2d at 374-76. The "waiver," enacted in 1978, provides that "[i]n considering an application for the registration of a pesticide, the Administrator [of EPA] *may* waive data requirements pertaining to efficacy." 7 U.S.C. § 136a(c)(5) (emphasis added). Neither the text of this data waiver authorization (which appears in the section of FIFRA entitled "Approval of registration"), nor its legislative history, refers to § 136v(b), which was enacted six years

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[5] In *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 248 (3d Cir. 1999) (a personal injury case), the Third Circuit asserted that "the pre-emptive effect of FIFRA is dependent on agency regulations." Despite that misreading of § 136v(b), it correctly concluded, based upon EPA's "absolute control of labeling regulation," and the "comprehensiveness of the regulations," that FIFRA pre-empts labeling-based state law claims. *Id.* at 251, 252. The court found that "the EPA's requirements for labeling pesticides are sufficiently specific to mandate preemption of claims based on state statutes or common law . . . To hold otherwise would be *to impose labeling requirements additional to those mandated by the EPA*." *Id.* (emphasis added).

earlier. It seems highly unlikely that Congress would have intended the efficacy data waiver authorization to effect a major limitation on the otherwise broad pre-emptive scope of § 136v(b) without ever mentioning such an intention, much less without amending the unequivocal text of § 136v(b) itself. "When Congress intends to preempt state regulatory authority but to leave common law actions intact, it knows how to accomplish that." *Etcheverry*, 993 P.2d at 372. Furthermore, even if there were some evidence that Congress in 1978 had considered the effect of the efficacy data waiver authorization on pre-emption, " 'the views of a subsequent Congress form a hazardous basis for inferring the [pre-emptive] intent of an earlier one.' " *Cipollone*, 505 U.S. at 520 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). "Of equal significance is the fact that Congress [which enacted major amendments to FIFRA in 1996] has remained silent in the face of *Cipollone* and its FIFRA progeny." *Hue v. Farmboy Spray Co.*, 896 P.2d 682, 691 (Wash. 1995). Congress could have "enact[ed] corrective legislation," if it believed that the cases holding that § 136v(b) pre-empts labeling related crop injury claims were inconsistent with the statute. *Id.*

Third, the Texas Supreme Court's opinion incorrectly assumes that EPA's implementation of FIFRA's efficacy data waiver authorization (even assuming that the waiver includes target area phytotoxicity data) means that EPA does not regulate "whether products are toxic to target area crops," and hence, that EPA does not regulate product labeling to prevent crop injury due to phytotoxicity. App. A at 12a. To the contrary, "[a]lthough the EPA has waived the submission of efficacy data for agricultural pesticides at the time of their initial registration, the agency does require and review such data if efficacy-related problems develop later." *Etcheverry*, 993 P.2d at 375. Indeed, EPA emphasized this point when it promulgated its efficacy data waiver regulation. *Id.* at 375-76; *see* 40 C.F.R. § 158.640(b)(1)

("each registrant must ensure through testing that his products are efficacious *when used in accordance with label directions* . . . [t]he Agency reserves the *right to require*, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration") (emphasis added); *see also* 44 Fed. Reg. 27,938, 27,939 (1979) (explaining that an efficacy data "request may be made for any product for which a pattern of inadequate performance has been reported"). Hence, insofar as target area phytotoxicity data are included within the efficacy data waiver, EPA has by regulation expressly reserved the right to require submission of such data both before and after a pesticide product is registered.[6] Along the same lines, EPA's adverse effects reporting regulation "[s]ignificantly . . . provides that information need not be reported for an 'incident' which 'concerns non-lethal *phytotoxicity to the treated crop* if the *label* provides an adequate notice of such a risk.' " *Etcheverry*, 993 P.2d at 376 (quoting 40 C.F.R. § 159.184(b)(4)) (emphasis added). Thus, after an

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[6] *See also* 40 C.F.R. § 158.35(c) ("Flexibility of the data requirements"); § 158.75(a) ("Requirements for additional data").

When a manufacturer proposes to include on its product labeling directions for use of a particular tank mix, EPA's longstanding policy is to review that in advance. *See* Pesticide Regulation ("PR") Notice 82-1 (Jan. 12, 1982) ("Revised Policy on Label Claims for Tank Mixing"). PR Notice 82-1, a guidance document which the opinion below ignores, advises that "the addition of tank mix claims to labels still *requires Agency review and approval* prior to distribution." *Id.* at 2 (emphasis added). EPA "will usually approve tank mix label claims without supporting compatibility and residue data," or efficacy data, if certain conditions are met. *Id.* One of those conditions is that "[t]he pesticide product to be mixed with the product which is the subject of the [FIFRA registration] application does not contain a label prohibition against such mixing." *Id.*

agricultural pesticide product is registered, EPA can and will regulate its labeling to prevent crop injury (e.g., by requiring the manufacturer to remove a tank mix combination from the labeling, or by providing an appropriate label warning regarding the tank mix) when and if EPA determines that it is necessary to do so. *See id.* at 375 (discussion of "The EPA's postregistration consideration of efficacy"); *see also Kuiper v. American Cyanamid Co.*, 131 F.3d at 663-65 (discussing EPA regulation of labeling to prevent crop injury due to herbicide phytotoxicity).[7]

Fourth, to the extent that EPA affirmatively has determined not to regulate efficacy or phytotoxicity on pesticide labeling, but instead to allow the marketplace to "regulate" those subjects, the Texas Supreme Court failed to recognize that a "federal decision to forgo regulation in a given area may imply an authoritative determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983). Therefore, if EPA's " 'failure ... affirmatively to exercise [its] full authority takes on the character of a ruling that no such regulation is appropriate or

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[7] The Texas Supreme Court's opinion affords deference to 40 C.F.R. § 158.540(b)(1), which provides that target area phytotoxicity data are required for Special Review circumstances. *See* App. A at 6a. The Special Review process enables EPA to review any significant post-registration risk concerns regarding one or more uses of a pesticide and to determine what regulatory actions the manufacturer must take, such as revision or addition of label warnings, in order to maintain the pesticide's FIFRA registration. *See* 40 C.F.R. pt. 154. As a result, EPA's requirement in § 158.540(b)(1) that target area phytotoxicity data are required for Special Reviews further confirms that EPA regulates labeling to prevent phytotoxic crop injury when circumstances make that necessary.

approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

B. The Texas Supreme Court's Opinion Erodes Congressional Policy

Congress long has considered EPA-approved product labeling to be "the final authority" governing the application of a pesticide. S. Rep. No. 95-334, at 4 (1977); *see* 7 U.S.C. § 136j(a)(2)(G) (making it unlawful to use a pesticide in a manner inconsistent with its labeling). Respondents' state law damages claims, however, unavoidably challenge the EPA-approved product labeling which explicitly authorized Pursuit to be applied in a tank mix combination with Prowl to control weeds that attack peanut crops. Unless pre-empted, Respondents' claims, all of which are based on Cyanamid advertising and promotional statements repeating the information on the labeling that Pursuit can be tank mixed with Prowl for use on peanut crops, would enable a Texas state trial court to be the "final authority" regarding that tank mix combination.

Allowing juries to oversee (or more probably, simply ignore) EPA's regulation of labeling would permit a Texas state court jury to impose liability upon Cyanamid for marketing its FIFRA-registered pesticide products with EPA-approved labeling that authorized the tank mix. In other words, labeling-related claims such as Respondents' would allow state trial courts "to sit, in effect, as super-EPA review boards," second-guessing the content of EPA-approved labeling, and subjecting pesticide manufacturers to liability for failure of the EPA-approved labeling to satisfy any state-imposed tort or other requirements. *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 73 (8th Cir. 1995). That would directly conflict with Congress' mandate,

reflected in § 136v(b), that each pesticide product be distributed with nationally uniform labeling regulated exclusively by EPA. *See Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 162 (10th Cir. 1992) ("State court damage awards . . . would constitute ad hoc determinations of the adequacy of statutory labeling standards [which] would hinder the accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards."); *see also Etcheverry*, 993 P.2d at 376 ("having lay juries assess questions of phytotoxicity in the context of failure-to-warn claims is neither necessary nor desirable, and holding that such actions are preempted by FIFRA promotes federalism, rather than undermines it").

Moreover, the potential ramifications of the Texas Supreme Court's "no EPA regulation, no pre-emption" misinterpretation of § 136v(b) are not limited to labeling-related claims alleging phytotoxic crop injury. Under the state supreme court's theory, any failure-to-warn or other labeling-related personal injury or crop injury claim involving *any* subject that EPA chooses not to review or regulate at the time a pesticide product is first registered would be exempt from pre-emption.

The inevitable resultant erosion of Congress' mandate that pesticides be distributed with labeling regulated solely by EPA, and that the States not impose their own additional or different requirements for pesticide labeling, is a compelling reason why this Court should review the Texas Supreme Court's opinion.[8]

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[8] The Texas Supreme Court, having found that § 136v(b) does not expressly pre-empt labeling-related crop injury claims, failed to consider whether such claims are barred under the doctrine of implied conflict pre-emption. (Cyanamid argued below that Respondents' claims are both expressly *and* impliedly pre-empted.) In *Geier v. American Honda*

(Footnote cont'd on next page.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Footnote cont'd from previous page.)

Motor Co., 529 U.S. 861, 869 (2000), this Court reaffirmed that an "express pre-emption provision . . . does *not* bar the ordinary working of conflict pre-emption principles" (emphasis in original). *See also Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (an argument "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute . . . is without merit"). The Texas Supreme Court's opinion erred, therefore, by viewing this as strictly "an express preemption case." App. A at 3a.

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. 01-0008

AMERICAN CYANAMID COMPANY, PETITIONER,
v.
TERRY GEYE AND BRANDON GEYE, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

Argued Nov. 7, 2001

JUSTICE ENOCH delivered the opinion of the Court.

The question is whether the Federal Insecticide, Fungicide, and Rodenticide Act[1] ("FIFRA") and its implementing regulations preempt state common-law damage claims for crop damage--specifically, damage to peanut plants. Ordinarily in federal preemption cases, we are asked to decide the scope of preemption, whether congressionally expressed or implied. But in this case, it is not the breadth of preemption, but rather the breadth of the congressionally created exception to express preemption that determines the outcome.

As we explain, Congress has dictated that state actions regarding product labeling are preempted to the extent that the content of the product label is regulated. But Congress has permitted its regulatory body, the Environmental Protection Agency, to choose NOT to regulate product labeling with respect to how well a product

[1] 7 U.S.C. §§ 136-136y.

works, that is, the product's "efficacy." Central to this case, the EPA has also chosen to define product efficacy to include "target area phytotoxicity," that is, the effect of a particular product or combination of products on the crops that are deliberately sprayed. Simply put, the EPA does not regulate herbicide labels regarding how well a product works, and this includes if the product actually injures the crops it was intended to assist. Because of the EPA's choice not to regulate, and therefore because there are no labeling or packaging requirements regarding crop damage imposed under FIFRA, we conclude that state common-law claims about target area crop damage are not preempted. Thus, the Geyes' claims are not preempted.

I

Terry Geye and his son Brandon are peanut farmers. The summary judgment evidence shows that in 1993 they treated part of their peanut crop with a mixture of the herbicides Pursuit and Prowl, both of which American Cyanamid manufactures. In selecting the Pursuit-Prowl combination, the Geyes claim they relied on various labels and advertisements that specifically stated that Pursuit could be "tank mixed" with Prowl. The advertisements also stated that Pursuit was a sound choice for crop safety and that it does not cause injury to peanut plants. But the Geyes allege that applying the Pursuit-Prowl mix to their fields actually injured their peanut plants. The Geyes assert that the Pursuit-Prowl mix stunted root growth and inhibited foliage development which resulted in a 3,000-pound per acre reduction in crop yield.

The Geyes sued American Cyanamid. They alleged breach of express and implied warranties, strict liability, and violation of the Texas Deceptive Trade Practices Act. American Cyanamid filed a motion for summary judgment, asserting that FIFRA preempted the claims. The trial court agreed and dismissed the claims. The court of appeals

reversed, holding that FIFRA did not preempt the Geyes' crop-damage claim.[2] We affirm the judgment of the court of appeals.

II

Under the Supremacy Clause of the United States Constitution, the laws of the United States are "the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[3] "A state law is preempted and 'without effect' if it conflicts with federal law."[4] Congressional intent determines whether a federal statute preempts state law.[5] Preemption may be determined by the express provisions provided by Congress.[6] It may also be implied if the statute's scope indicates that Congress intended federal law to occupy the field, or when state law actually conflicts with federal law.[7] Finally, preemption based on an actual conflict may still exist even if the claim is not expressly preempted under the relevant statute.[8]

This is an express preemption case. FIFRA contains an express preemption clause that provides that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]."[9] Preemption of state law claims

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2 32 S.W.3d 916, 921.

3 U.S. Const. art. VI, cl. 2.

4 *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 4 (Tex. 1998) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

5 *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 366-67 (Tex. 1998) ("We are ... bound to give effect to the will of Congress.").

6 *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

7 *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

8 *See Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861, 884 (2000); *see also Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 741 (Tex. 2001).

9 7 U.S.C. § 136v(b).

under this provision is linked to the labeling and packaging requirements imposed by FIFRA. Under this Act, Congress has given the EPA the role of evaluating and determining the content of pesticide labels.[10]

> The Administrator is authorized ... to prescribe regulations to carry out the provisions of this Act. Such regulations shall take into account the difference in concept and usage between various classes of pesticides, including public health pesticides, and differences in environmental risk and the appropriate data for evaluating such risk between agricultural, nonagricultural, and public health pesticides.[11]

Consequently, the EPA regulations define "the domain expressly pre-empted."[12] Because the EPA's labeling requirements determine what state actions are preempted, we cannot know whether the Geyes' crop-damage claim is preempted until we determine what the EPA requires for product labels concerning crop safety.

III

A

FIFRA is a comprehensive federal statute regulating pesticide use, sales, and labeling, and granting enforcement authority to the EPA.[13] The Act provides a detailed scheme for regulating the content and format for labeling herbicides. Under FIFRA, all herbicides sold in the United States must be registered with the EPA.[14] Each manufacturer must submit to the EPA a statement that includes a "complete

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10 *See id.* § 136w(a)(1).

11 *Id.*

12 *Cipollone,* 505 U.S. at 517.

13 *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 601 (1991).

14 7 U.S.C. § 136a(a).

copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use."[15] Each manufacturer must also submit "the complete formula of the pesticide"[16] and "a full description of the tests made and the results thereof upon which the claims are based."[17] After evaluating this information, the EPA then registers a product that "perform[s] its intended function without unreasonable adverse effects on the environment."[18]

But despite FIFRA's comprehensive nature, Congress authorized the EPA in 1978 to choose not to require the submission of data relating to the "efficacy" of products.[19] "Efficacy" refers to how well a product works or, as defined by the EPA, to the "product's ability to control the specific target pest or produce the specified plant or animal response when the product is applied in accordance with the label directions ..., precautions, and limitations of use."[20] Congress said: "In considering an application for the registration of a pesticide, the [EPA] Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy."[21] The EPA, acting under this authorization, has chosen not to collect efficacy data for any products except in a specific set of circumstances that are not relevant here.[22] Essential to this

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15 *Id.* § 136a(c)(1)(C).

16 *Id.* § 136a(c)(1)(D).

17 *Id.* § 136a(c)(1)(F).

18 *Id.* § 136a(c)(5)(C).

19 *See id.* § 136a(c)(5).

20 BERNARD A. SCHNEIDER, EPA, PESTICIDE ASSESSMENT GUIDELINES, SUBDIVISION G: PRODUCT PERFORMANCE 36 (1982) (available from the National Technical Information Service pursuant to 40 C.F.R. § 158.108).

21 7 U.S.C. § 136a(c)(5).

22 *See* 40 C.F.R. § 158.640(b)(1) (waiving efficacy data "unless the pesticide product bears a claim to control pest microorganisms that

case, the EPA has also chosen to include "target area phytotoxicity" within the concept of efficacy, and therefore the EPA has chosen not to collect data concerning "target area phytotoxicity."

B

"Target area" refers to the "area intentionally treated with a pesticide when label use directions are followed [i.e., the peanut field]."[23] The EPA further defines "target area plants" as "all plants located within the target area, and includes *both desirable and undesirable species* [i.e., the peanuts and the weeds]."[24] "Target area phytotoxicity" then describes the toxic effect to both desirable and undesirable plants within the target area. The Geyes' peanuts are desirable plants that are "target area plants" and are within the "target area."

The fact that the EPA has chosen not to collect data concerning target area phytotoxicity is found principally in two places. First, the data table found in 40 C.F.R. § 158.540 identifies the data that manufacturers must submit regarding plant protection. The table limits the submission of target area phytotoxicity to "Special Review" circumstances under 40 C.F.R. § 154.1 and in "certain public health situations."[25] American Cyanamid does not assert that either of these reviews occurred in this case.

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pose a threat to human health and whose presence cannot readily be observed by the user"); 40 C.F.R. § 158.540(b)(1) (waiving target area phytotoxicity data unless required for "Special Review and certain public health situations").

[23] ROBERT W. HOLST & THOMAS C. ELLWANGER, EPA, PESTICIDE ASSESSMENT GUIDELINES, SUBDIVISION J: HAZARD EVALUATION NONTARGET PLANTS 18 (1982) (available from the National Technical Information Service pursuant to 40 C.F.R. § 158.108).

[24] *Id.* (emphasis added).

[25] 40 C.F.R. § 158.540(b)(1).

Second, the EPA has authored a set of Pesticide Assessment Guidelines that "contain the standards for conducting acceptable tests, guidance on evaluation and reporting of data, definition of terms, further guidance on when data are required, and examples of acceptable protocols."[26] Specifically, *Pesticide Assessment Guidelines, Subdivision J: Hazard Evaluation Nontarget Plants* provides:

> (d) *Target area phytotoxicity testing waiver of requirements.*
>
> (1) The Administrator has determined that efficacy test data include target area phytotoxicity testing data, and that data submittal for such testing may be waived, by his authority under FIFRA Sec. 3(c)(5) [136a(c)(5) for most kinds of pesticide products.... Such products generally include all pesticides whose uses result in direct or indirect application to plants in the target area such as agricultural, lawn, and garden use.
>
> (2) Even though the Administrator will ordinarily waive the requirement for submittal of target area phytotoxicity test data as indicated in paragraph (b)(1) of this section, he reserves the authority to require such data on a case-by-case basis whenever the Administrator deems that such data are necessary to evaluate the acceptability of a product for registration. If it is determined that data phytotoxicity for a pesticide are necessary, the Agency will promulgate the specific target area phytotoxicity data requirements by letter to a specific registrant

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26 40 C.F.R. § 158.108.

or by general notice.[27]

As well, the EPA has limited the submission of data for the specific problem that the Geyes complain about--tank mixtures:

> (5) *Tank Mixtures*. When tank mixtures are recommended on product labeling, a study may be required on a case-by-case basis to demonstrate the extent of antagonism and synergism with respect to detrimental effects on *nontarget plants* by the products of tank mixtures.[28]

The EPA did not evaluate whether the tank-mixed Pursuit-Prowl combination had a toxic effect on peanut plants. It therefore could not evaluate the label claims made by American Cyanamid which stated that the combination was safe to use on peanut plants. It thus exercised no regulatory authority over American Cyanamid's label that specifically allowed the tank mixing of Pursuit and Prowl.

C

As a federal regulation, Section 158.540 is entitled to deference.[29] This regulation establishes that manufacturers submit target area phytotoxicity data only when the pesticide is subject to "Special Review"[30] or in "certain public health situations."[31] Nothing in the record suggests that the EPA evaluated the specific claims made on the label stating that Pursuit could be tank mixed with Prowl.

While *Subdivision J* is not entitled to the same deference as

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27 SUBDIVISION J at 15.

28 SUBDIVISION J at 29 (emphasis added).

29 *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

30 40 C.F.R. § 154.1.

31 40 C.F.R. § 158.540(b)(1).

an agency regulation, it may have the "power to persuade."[32] The EPA's choice not to evaluate efficacy claims has been consistent. In a proposed rule, first announced in 1979, the Agency explained that the choice "stemmed from a need to reduce the amount of resources devoted to reviewing product performance so that additional effort could be devoted to the evaluation of health and safety data."[33] In choosing not to evaluate the data regarding efficacy, the EPA relied on the marketplace to ensure that products were effective and did not "impart any detrimental effects (particularly on crops, ornamentals and other desirable plants) for which they could be liable."[34] The EPA's reliance on the marketplace found its way into *Subdivision J:* "The Agency has determined that target area phytotoxicity data does not need to be submitted because the registrants are generally willing to accept the overall responsibility of the product [with] respect to efficacy and phytotoxicity."[35]

The information contained in the *Assessment Guideline* was originally published by the EPA as a proposed rule on November 3, 1980.[36] The proposed rule was to be designated as a regulation to be published in Section 40 C.F.R. § § 163.120-1 to 163.120-4. The specific choice not to collect data on target area phytotoxicity now found in *Subdivision J* was in this proposed rule. As a proposed rule,

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32 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

33 Interim Final Regulation Relating to Conditional Registration, 44 Fed. Reg. 27932, 27938 (May 11, 1979) (to be codified at 40 C.F.R. pt. 162.).

34 Proposed Data Requirements, 47 Fed. Reg. 53192, 53196 (Nov. 24, 1982) (to be codified at 40 C.F.R. pt. 158).

35 SUBDIVISION J at 7.

36 Proposed Guidelines for Registering Pesticides in the United States: Subpart J: Hazard Evaluation: Nontarget Plants and Microorganisms, 45 Fed. Reg. 72948, 72961 (Nov. 3, 1980) (to be codified at 40 C.F.R. pts. 162, 172).

it was subject to public comment and consideration.[37] In 1981, it appears that the EPA decided not to codify Section 162.120 as a regulation and instead proposed that the information contained in proposed Section 162.120 become *Subdivision J.*[38] According to the EPA, this was to "limit the regulation to a concise presentation of the data requirements and when they are required."[39] The EPA adopted this approach, and the current regulation specifically references the *Assessment Guidelines.*[40] It appears that the *Assessment Guidelines* are essentially the EPA's directions to pesticide manufacturers on what tests to conduct, how to conduct those tests, and what data is required for registration.

In sum, the EPA has had a relatively consistent approach to not collecting data on target area phytotoxicity since at least 1980. Including target area phytotoxicity within the concept of efficacy reflects the conclusion that a product will not be considered effective by consumers if it harms the plants that it was intended to assist. It also reflects the EPA's assumption that if a manufacturer states that a product is safe to use on peanut plants, that manufacturer has made sure that the product is in fact "safe for use on peanut plants." Finally, the fact that the information in *Subdivision J* was subject to public disclosure and comment is an important factor in determining the level of deference it should receive.[41] *Subdivision J* persuades us that the EPA does not regulate label claims about target area phytotoxicity.

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37 *See* SUBDIVISION J at 1-13 (discussing public comment received on proposed regulation).

38 Proposed Data Requirements, 47 Fed. Reg. at 53192.

39 *Id.*

40 40 C.F.R. § 158.108.

41 *See Christensen v. Harris County,* 529 U.S. 576, 586-87 (2000).

D

In concluding that the Geyes' claims were not preempted, the court of appeals relied on an opinion letter issued by the EPA, *Pesticide Regulation (PR) Notice 96-4*.[42] American Cyanamid takes issue with the court of appeals' reliance on the opinion letter. *PR Notice 96-4* describes the product labeling process and details the EPA's choice not to collect efficacy data. *PR Notice 96-4* essentially concludes that state law actions should not be preempted because the EPA does not determine if a product will be "efficacious or will not damage crops or cause other property damage."[43] The court of appeals did substantially rely on *PR Notice 96-4*: "Our decision is based upon the information contained in [*Notice 96-4*], and we conclude that we should quote extensively from the EPA regulation."[44] American Cyanamid argues that *PR Notice 96-4* is a "narrowly focused legal brief thinly disguised as an EPA guidance document; it is by no means a 'regulation.' " We agree with American Cyanamid. *PR Notice 96-4* is not a regulation and the court of appeals erred in its substantial reliance on the *Notice*.

But the EPA's choice not to collect target area phytotoxicity data, as found in 40 C.F.R. § 158.540 and the EPA's *Assessment Guideline, Subdivision J, Hazard Evaluation Nontarget Plants* convinces us that the conclusion reached by the court of appeals was correct. The combination of these two sources demonstrates that the EPA does not regulate product labeling with respect to a product's target area phytotoxicity. Thus the Geyes' crop-damage claim is not preempted.

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42 PESTICIDE REGULATION (PR) NOTICE 96-4 (June 3, 1996), *available at* http://www.epa.gov/opppmsd1/PR Notices/pr96-4.html.

43 *Id.*

44 32 S.W.3d at 918.

IV

We acknowledge that many jurisdictions that have considered this issue have reached the opposite result.[45] But all these cases are based on the premise that the EPA regulates whether products are toxic to target area crops. For example, the California Supreme Court considered the efficacy waiver in a case factually similar to ours--*Etcheverry v. Tri-Ag Service, Inc.*[46]

The plaintiffs in *Etcheverry* claimed that applying two products, Guthion and Morestan, reduced its walnut production, resulting in about $150,000 in damages.[47] The California Supreme Court held that the plaintiffs' crop-damage claims were preempted by FIFRA, concluding that the EPA's waiver of efficacy data was "beside the point" and "irrelevant"[48] because the plaintiffs were complaining about *phytotoxicity* and not *efficacy.* But in so holding, the California Supreme Court did not draw the essential distinction between phytotoxicity and target area phytotoxicity that the EPA historically has.

Likewise in *Taylor AG Industries v. Pure-Gro,*[49] the Ninth Circuit did not consider the EPA's decision to not collect target area phytotoxicity data. The court described the EPA review as "rigorous" and that "the EPA approves each label only after a careful review of the product data and the draft label."[50] Of course, that may be true for phytotoxicity

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45 *See, e.g., Andrus v. AgrEvo USA Co.,* 178 F.3d 395 (5th Cir. 1999); *Kuiper v. American Cyanamid Co.,* 131 F.3d 656 (7th Cir. 1997); *Taylor AG Indus. v. Pure-Gro,* 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.,* 5 F.3d 744 (4th Cir. 1993).

46 993 P.2d 366 (2000).

47 *Id.* at 368.

48 *Id.* at 375.

49 54 F.3d at 560.

50 *Id.*

generally, but it is not true for target area phytotoxicity. With respect to target area phytotoxicity, the EPA makes no review. And without that review and approval process, there certainly can be no federal regulation. And without EPA regulation, there can be no preemption.

V

In *Quest Chemical Corp. v. Elam,*[51] considered FIFRA's preemptive effect in the context of a personal injury suit. We reversed the court of appeals' judgment that allowed the plaintiff's strict liability and implied warranty claims to escape federal preemption. We stated, "FIFRA preempts all common law tort suits against manufacturers of EPA-registered pesticides which are based solely upon claims relating directly or indirectly to labeling."[52] *Quest* does not control this case. The fundamental difference is that *Quest* involved a claim for personal injury while this case involves a claim for target crop damage. The EPA continues to collect data concerning safety to humans. Regulating labeling concerning these health issues remains one of the Agency's primary mandates. After all, the EPA used concern for health and safety as one of the justifications for not evaluating efficacy claims:

> The decision to [not collect and review] efficacy [data] as an Agency policy stemmed from a need to reduce the amount of resources devoted to reviewing product performance so that additional effort could be devoted to the evaluation of health and safety data, and from a desire to reduce regulatory burdens in pesticide registration.[53]

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51 898 S.W.2d 819, 820 (Tex. 1995).

52 *Id.*

53 Interim Final Regulation Relating to Conditional Registration, 44 Fed. Reg. at 27938.

VI

This case is unlike many cases in the preemption area where we struggle to determine the breadth of federal preemption expressed in a federal statute. For here we must determine the breadth, not of the preemption itself, but of an exception to that preemption founded on Congressional authorization for the EPA to specifically choose to not collect efficacy data. Acting on that authorization, the EPA has chosen not to evaluate whether a product will be toxic to the crops it was intended to assist. Because the EPA does not evaluate whether a product will be toxic to the crops that it was intended to assist, the EPA does not regulate a product's labeling claims on this subject. Because the scope of FIFRA's preemption is dependent on what the EPA regulates, FIFRA does not preempt the Geyes' common law crop-damage claim. For these reasons we affirm the court of appeals' judgment.

Opinion Delivered: June 6, 2002

/s/_____
Craig T. Enoch
Justice

APPENDIX B

11th Court of Appeals
Eastland, Texas

Terry GEYE and Brandon Geye, Appellants,

vs.

American Cyanamid Company, Appellee

No. 11-99-00034-CV – Appeal from Eastland County

The issue in this case is whether plaintiffs' state law claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 7 U.S.C.A. § 136 et seq. (West 1999). We hold that they are not.

Terry Geye and Brandon Geye sued American Cyanamid Company contending that the mixed application of herbicides, Prowl and Pursuit, manufactured by defendant damaged plaintiffs' peanut crop. Plaintiffs alleged theories of strict liability, breach of express and implied warranties, and violation of the Texas Deceptive Trade Practice-Consumer Protection Act (DTPA).[1] The trial court granted defendant's motion for summary judgment on the ground that plaintiffs' claims were preempted by FIFRA.

The summary judgment proof shows that plaintiffs treated some of their land with a tank mix combination of Prowl and Pursuit. The peanuts in the treated fields did not develop properly. The roots were stunted, and the plants did

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[1] TEX. BUS. & COM. CODE ANN. § 17.41 et seq. (Vernon 1987 & Pamph Supp. 2000).

not properly develop foliage. Before purchasing Prowl and Pursuit, plaintiffs relied upon off-label magazine and brochure advertisements made by defendant regarding Prowl and Pursuit. These advertisements stated that "PURSUIT can be tank mixed with other popular products such as PROWL herbicide." The Pursuit labeling specifically stated that Pursuit and Prowl may be combined by tank mixing.[2] There is summary judgment proof that plaintiffs sustained substantial loss in yield because of the combined application of Prowl and Pursuit.

All of plaintiffs' state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing. Defendant relies upon many federal and state cases that have held that state law claims against manufacturers of Environmental Protection Agency (EPA) registered pesticides which relate directly or indirectly to labeling are preempted by FIFRA. See Hawkins v. Leslie's Pool Mart, Inc., 184 F.3d 244 (3rd Cir. 1999); Andrus v. AgrEvo USA Company, 178 F.3d 395 (5th Cir. 1999); Kuiper v. American Cyanamid Company, 131 F.3d 656 (7th Cir. 1997), cert. den'd, 523 U.S. 1137 (1998); Welchert v. American Cyanamid, Inc., 59 F.3d 69 (8th Cir. 1995); Taylor AG Industries v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995); MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994); Worm v. American Cyanamid Company, 5 F.3d 744 (4th Cir. 1993); King v. E.I. Dupont De Nemours and Company, 996 F.2d 1346 (1st Cir.), cert. dism'd, 510 U.S. 985 (1993); Etcheverry v. Tri-Ag Service, Inc., 993 P.2d 366 (Cal. 2000).

The Texas Supreme Court in Quest Chemical Corporation v. Elam, 898 S.W.2d 819, 820 (Tex.1995), when

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[2] The off-label statements merely repeated information on the labels. See Kuiper v. American Cyanamid Company, 131 F.3d 656 (7th Cir. 1997).

considering the alleged failure of the manufacture of a herbicide to provide adequate warnings and instructions on its product, stated:

> FIFRA provides a detailed scheme for regulating the content and format of labeling for herbicides and other chemical substances. It requires, among other things, that all herbicides sold in this country be registered with the United States Environmental Protection Agency ("EPA"). See MacDonald v. Monsanto Co., 27 F.3d 1021, 1024 (5th Cir. 1994) (discussing the details of FIFRA labeling requirements); Worm v. American Cyanamid Co., 5 F.3d 744, 747 (4th Cir. 1993) (reviewing the preemptive scope of FIFRA). FIFRA preempts all common law tort suits against manufacturers of EPA-registered pesticides which are based solely upon claims relating directly or indirectly to labeling.

FIFRA expressly mandates that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C.A. § 136v. The preemptive effect of FIFRA is dependent on agency regulations. Hawkins v. Leslie's Pool Mart, Inc., supra. The court in Welchert v. American Cyanamid, Inc., supra at 71, described the role of the EPA as:

> FIFRA creates a comprehensive scheme for the regulation of pesticide labeling and packaging. See Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 601 (1991). Furthermore, all pesticides sold in the United States must be registered with the Environmental Protection Agency (EPA).

> See 7 U.S.C. § 136a(a). "The objectives and purposes of FIFRA include the strengthening of federal standards, increasing EPA authority for their enforcement, and providing a comprehensive and uniform regulation of the labeling, sale, and use of pesticides." Worm v. American Cyanamid Company, 5 F.3d at 747. FIFRA establishes a complex process of EPA review that culminates in the approval of a label under which a product may be marketed. Manufacturers must submit draft label language addressing a number of different topics, including ingredients, directions for use, and adverse effects of the products, see 7 U.S.C. § 136a(c); 40 C.F.R. § 152.50 & pt. 156, and a final label must be submitted to the EPA prior to registration. 40 C.F.R. § 156.10(a)(6).

On June 3, 1996, the EPA office of Pesticide Programs issued Pesticide Regulation (PR) Notice 96-4. Our decision is based upon the information contained in that official notice, and we conclude that we should quote extensively from the EPA regulation.[3] (PR) Notice 96-4 provides in part:

> EPA is issuing this notice at this time to correct a misunderstanding regarding the FIFRA label approval process and efficacy claims that is reflected in a series of court decisions concerning the preemptive effect of FIFRA.

II. LEGAL FRAMEWORK

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[3] (PR) Notice 96-4 has only recently been discussed by the courts. It was not urged in the trial court in this case.

A. Registration and the Label Approval Process

EPA approves pesticide labels in the process of registering a pesticide under FIFRA. FIFRA specifies that EPA shall register a pesticide if:

> (1) its composition is such as to warrant the proposed claims for it;
>
> (2) its labeling and other material required to be submitted comply with the requirements of this Act;
>
> (3) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (4) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136c(c)(5). Although the first registration requirement identified above mandates that EPA consider efficacy of label claims, Congress, in 1978, explicitly gave EPA the authority to waive that requirement. FIFRA states:

> In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy.

EPA has acted under this authority to waive, by regulation, data requirements as to efficacy issues for all agricultural pesticides. 44 Fed. Reg. 27932, 27938 (col. 3) (May 11, 1979); 40 CFR 158.640(b)(1); see also 47 Fed. Reg. 57624 (December 27, 1982). EPA concluded that agriculture pesticides are "effectively regulated by the

marketplace." 44 Fed. Reg. 27932, 27938 (col. 3) (May 11, 1979), and that waiving review of the efficacy of agricultural pesticides in the registration process would enable the Agency to focus of its "primary mandate under FIFRA": investigating "the health and safety aspects of pesticides." 47 Fed. Reg. 53192 (November 24, 1982); 47 Fed. Reg. 40659, 40661 (col. 1) (September 15, 1982). EPA pointed to private legal actions for damages as one factor that would ensure that pesticide manufactures sold an efficacious product: "pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use." 47 Fed. Reg. 40659, 40661 (col. 2) (September 15, 1982).

FIFRA permits states broad authority to regulate pesticides but makes it unlawful for states that undertake such regulation to "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." 7 U.S.C. § 136v(b). A number of federal court decisions have held that this preemption of state authority as to pesticide labels bars damage claims in state court by growers against pesticide manufacturers. The courts have reasoned that allowing such a claim by a grower would be, in effect, permitting the state to impose label requirements "in addition to or different from" the federally-approved label.

There have been several recent preemption decisions involving claims by growers concerning pesticidal efficacy or property damage caused by a pesticide. For example, in Taylor AG Industries v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995), several growers sued the manufacturers and distributor of a pesticide that the growers alleged had damaged their cotton crop even through they had applied the pesticide according to the label directions. The court denied the growers' claims on the ground that allowing recovery of damages would interfere indirectly with EPA's "rigorous

label-approval process." Id. at 560. In Welchert v. American Cyanamid, Inc., 59 F.3d 69 (8th Cir. 1995), and Worm v. American Cyanamid, Inc., 5 F.3d 744 (4th Cir. 1993), growers sued a pesticide manufacturer seeking recovery for harm to crops allegedly caused when the manufacturer's herbicide remained in the soil and damaged rotated crops. Both courts dismissed the growers' claims noting that EPA's labeling regulations required instructions on rotational crop restrictions. The courts reasoned that to permit such lawsuits "would be to allow state courts to sit, in effect, as super-EPA review boards that could question the adequacy of the EPA's determination of whether a pesticide registrant successfully complied with the specific labeling requirements of its own regulations." Welchert, 59 F.3d at 73; Worm, 5 F.3d at 749.

These court decisions are based on the premise that, in approving labels for agricultural pesticides, EPA examines, or at least has the obligation to examine, the efficacy of the pesticide and related issues such as the potential for the pesticide to cause property damage. The courts, however, have not taken into account the plain language of the statute on this issue and have misinterpreted the thrust of EPA's regulations. As noted above, in actual fact, EPA, with Congress' approval, stopped evaluating pesticide efficacy for routine label approvals almost two decades ago. Further, as explained below, EPA's regulations do not require a review of efficacy of property damage issues for agricultural pesticides.

Finally, as to pesticide users this Notice is intended to clarify that EPA's approval of a pesticide label does not reflect any determination on the part of EPA that the pesticide will be efficacious or will not damage crops or cause other property damage.

The Supreme Court of California in Etcheverry v. Tri-Ag Service, Inc., supra, recently discussed (PR) Notice

96-4. The claimants in Etcheverry contended that their walnut crop was damaged because of inadequate labeling of certain pesticides. The trial court granted a summary judgment holding that claimants' claims were preempted by FIFRA. The United States filed an amicus curiae brief on behalf of the claimants citing (PR) Notice 96-4 and argued that the case involved pesticide efficacy and that claimants' state law claims were not preempted by FIFRA.

The Supreme Court of California first concluded that claimants were not claiming that the pesticides they used were "inefficacious" but rather that they claimed that they should have been warned that the combined use of pesticides could be "phytotoxic." The court discussed the EPA's guidelines regarding "phytotoxicity" as distinguished from "efficacy" and stated that "Phytotoxicity is not a matter of efficacy." The court continued:

> Because the EPA does not review efficacy claims, the United States asserts, "preemption of state damages actions challenging pesticide efficacy would leave such statements largely, or entirely, unregulated."
>
> Again, the short answer to this argument is that the EPA's waiver of the submission of efficacy data is irrelevant, since plaintiffs complain of phytotoxicity, not inefficacy. However, even assuming arguendo that phytotoxicity is included within the concept of efficacy, there remain two fundamental flaws in the argument that pesticide efficacy will go "largely, or entirely, unregulated" if state failure-to-warn claims are preempted: (1) Although the EPA has waived the submission of efficacy data for agricultural pesticides at the time of their initial

> registration, the agency does require and review such data if efficacy-related problems develop later; and (2) California has a comprehensive registration and regulatory program for pesticides, and while the California Department of Pesticide Regulation may not impose its own requirements for labeling, it can restrict or prohibit the sale or use of products that it determines are inefficacious or phytotoxic.

The court concluded that FIFRA preempts state law claims for failure to warn of the risks of using a pesticide. We do not agree with the Etcheverry court that the court's answers to the questions raised by the United States determine the issue of federal preemption.

The court in Nathan Kimmel, Inc. v. DowElanco, 64 F. Supp. 2d 939 (C.D. Cal. 1999), recognized that the EPA stated in (PR) Notice 96-4 that it has exercised its statutory option to waive certain data requirements under FIFRA. The court, however, concluded:

> While these are valid arguments, the Court is bound by the currently-existing law of this circuit. Therefore, though the Court encourages Kimmel to raise these issues on appeal, the Court must find Kimmel's claims preempted.

We do not believe that Congress intended to preempt state law efficacy claims after the EPA exercised its authority and, as noted in (PR) Notice 96-4, "stopped evaluating pesticide efficacy for routine label approvals almost two decades ago." The purpose of Congress is the ultimate touchstone in every preemption case. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

We point out that our decision is not in conflict with

our supreme court's opinion in Quest Chemical Corporation v. Elam, supra. That case involved personal injuries resulting from the use of a product. This case involves the efficacy of the tank mix combination of the products and property damage. (PR) Notice 96-4 expressly states that:

> [W]aiving review of the efficacy of agricultural pesticides in the registration process would enable the Agency to focus of its "primary mandate under FIFRA": investigating "the health and safety aspects of pesticides."

We hold that plaintiffs' state law claims relating directly or indirectly to labeling are not preempted by FIFRA because such claims involve the efficacy of the products and not the risks to humans and the environment posed by the use of the product.

The judgment of the trial court is reversed, and the cause is remanded.

_____/s/_____
AUSTIN McCLOUD
SENIOR JUSTICE

November 16, 2000

Publish. See TEX.R.APP.P. 47.3(b).

Panel consists of: Arnot, C.J, and McCall, J., and McCloud, S.J.[4]

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[4] Austin McCloud, Retired Chief Justice, Court of Appeals, 11th District of Texas at Eastland sitting by assignment.

APPENDIX C

No. 35,851

TERRY GEYE AND BRANDON GEYE	*	IN THE DISTRICT COURT OF
VS.	*	EASTLAND COUNTY, TEXAS
AMERICAN CYANAMID COMPANY	*	91st JUDICIAL DISTRICT

FINAL JUDGMENT

Came on to be heard on the 21st day of August, 1998, Defendant's Motion for Summary Judgment and Defendant's First Supplement to its Motion for Summary Judgment and, in the Alternative, Motion for Partial Summary Judgment and, having considered same, Plaintiffs' Responses, other pleadings and motions filed, the record and the applicable authorities, this Court is of the opinion that Defendant's Motion for Summary Judgment should be GRANTED.

It is, therefore, ORDERED, ADJUDGED AND DECREED that a final summary judgment is hereby granted to Defendant on the ground that each and all of the Plaintiffs' claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136, et seq.; that Plaintiffs shall take nothing by their suit; and that Defendant, American Cyanamid Company, may recover court costs from the Plaintiffs, Terry Geye and Brandon Geye, jointly and severally.

IT IS FURTHER ORDERED and DECREED that taxable court costs are to be paid by the Plaintiffs, for which

let execution issue.

The Court DENIES all relief not granted in this judgment.

SIGNED this 26th day of January, 1999.

/s/
JUDGE PRESIDING

TERRY BRADSHAW
OFFICIAL COURT REPORTER

LAVERN KEY
COURT ADMINISTRATOR

STEVEN R. HEROD
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91ST JUDICIAL DISTRICT
EASTLAND COUNTY COURTHOUSE
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October 22, 1998

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Re: No. 35,8512 Terry Geye and Brandon Geye vs. American Cyanamid Company, Voluntary Purchasing Croups, Inc., and Lawrence Farm & Ranch Supply, Inc.

Gentlemen:

I have read your motions, responses and the cases you have cited. I have also considered the pleadings, the exhibits, the summary judgment evidence before the Court and the argument of counsel.

By this letter you are informed that I have concluded and find that the defendants are entitled to summary judgment as a matter of law as to each of plaintiffs' claims as those claims are directly or indirectly related to the product's labeling and therefore preempted by FIFRA.

Sincerely,

_____/s/_____

Steven R. Herod

SH/tb

APPENDIX D

40 C.F.R. § 158.540 Plant protection data requirements.

(b) NOTES. – The following notes are referenced in column two of the table contained in paragraph (a) of this section.

[Target area phytotoxicity]

(1) Data are required for Special Review and certain public health situations.

40 C.F.R. § 158.640 Product performance data requirements.

(b) Notes: The following notes are referenced in column two of the table contained in paragraph (a) of this section.

(1) The Agency has waived all requirements to submit efficacy data unless the pesticide product bears a claim to control pest microorganisms that pose a threat to human health and whose presence cannot readily be observed by the user including, but not limited to, microorganisms infectious to man in any area of the inanimate environment or a claim to control vertebrates (such as rodents, birds, bats, canids, and skunks) that may directly or indirectly transmit diseases to humans. However, each registrant must ensure through testing that his products are efficacious when used in accordance with label directions and commonly accepted pest control practices. The Agency reserves the right to require, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration.

Supreme Court, U.S.
FILED
OCT 7 2002
OFFICE OF THE CLERK

No. 02-367

In The

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,

Petitioner,

v.

TERRY GEYE and BRANDON GEYE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether, in light of the fact that the decision below is interlocutory, the Texas Supreme Court's judgment qualifies for review under the fourth exception to finality set forth in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

If so, whether the congressionally authorized efficacy data requirement waiver found in the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(c)(5), and implemented by the Environmental Protection Agency ("EPA") by 40 C.F.R. 158.540 includes data pertaining to target area phytotoxicity.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari ("Pet.") filed by American Cyanamid Company, seeking review of the decision of the Supreme Court of Texas entered in this case on June 6, 2002. That decision is not final, but it is correct.

JURISDICTION

The Court does not have jurisdiction of this case because the Texas Supreme Court's ruling is not a final judgment under 28 U.S.C. § 1257 for the reasons discussed at pages 3-9 below.

STATEMENT OF THE CASE

This is a false advertising case. Respondents Terry Geye and his son Brandon ("the Geyes") are peanut farmers who purchased and applied to their 1993 crop the herbicides Prowl and Pursuit, both of which are manufactured by Petitioner American Cyanamid Company ("Cyanamid"). In choosing these products, the Geyes relied upon representations made by Cyanamid in various brochures and magazine advertisements. According to the Texas court of appeals, "[t]hese advertisements stated that 'PURSUIT can be tank mixed with other popular products such as PROWL herbicide,'" and such "off-label statements merely repeated information on the [product] labels." *Pet. App. B* at 16a and n.2. The court further wrote that "[a]ll of plaintiffs' state law claims related directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." *Id.* at 16a. However, of

the ten (10) specific advertising representations made by Cyanamid and catalogued in the Geyes' third amended petition in the trial court, only the representation quoted by the court of appeals concerned tank mixing. *App.* at 2a-3a. The court of appeals held "that plaintiffs' state law claims relating directly or indirectly to labeling are not preempted by FIFRA. . . . " *Pet. App. B* at 24a.

As an alternative reason for the Texas Supreme Court to affirm the judgment of the court of appeals, the Geyes argued that the court of appeals erred in holding that all of their claims related directly or indirectly to the product label stating that the herbicides may be combined by tank mixing. The Texas Supreme Court did not address this argument because it held "that the EPA does not regulate product labeling with respect to a product's target area phytotoxicity." *Pet. App. A* at 11a. Cyanamid suggests that "[t]he state supreme court did not *disturb* the findings of the court of appeals and trial court that all of Respondents' claims are directly or indirectly related to the herbicide products' EPA-approved labeling."[1] *Pet.* at 8 (emphasis

[1] Cyanamid maintains that the trial court "found" that all of the Geyes' claims are label-related, and that the court of appeals "agreed." *Pet.* at 6. That is simply wrong. The district court's finding, to which Cyanamid refers, is contained in a pre-judgment letter from the court to counsel. *Pet. App. C* at 28a. Under Texas summary judgment practice, "[t]he court's pre-judgment letter does not constitute competent evidence of the basis for the court's ruling." *Maddox v. Cosper*, 25 S.W.3d 767, 771 n. 5 (Tex.App. – Waco 2000, no pet.) (citing *Cherokee Water Co. v. Gregg County Appraisal Dist.*, 801 S.W.2d 872, 878 (Tex. 1990)). The basis for the district court's ruling is contained in its final judgment where the court granted summary judgment to Cyanamid "on the ground that each and all of the Plaintiffs' claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, et seq." *Pet. App. C* at 25a.

added). Actually, the state supreme court did not *reach* the question of whether all of the Geyes' claims are label-related. The issue was mooted by the court's decision based on its interpretation of the breadth of the congressionally created exception to FIFRA preemption. *See Pet. App. A* at 14a.

REASONS FOR DENYING THE PETITION

I. THE COURT LACKS JURISDICTION

This case has been remanded by the state supreme court to the district court for trial on the merits. Cyanamid acknowledges that the judgment below is not final for the purposes of 28 U.S.C. § 1257, but attempts to fit the case within the final-judgment rule's fourth exception as set forth in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 483-84 (1975). That exception becomes applicable when both of the following criteria are met: (1) "where the federal issue has been finally decided in the state courts . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and (2) "if a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* Neither of these criteria is here met.

A. The Decision of the Texas Supreme Court is not Final on all Federal Issues

The circumstances that warrant a departure from the final-judgment rule are "very few." *Cox,* 420 U.S. at 477 (quoting *WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945)). This Court has observed that "[i]n most, if not all," of those few cases that fall within any of the *Cox* exceptions,

"additional [state court] proceedings would not require the decision of other federal questions that might also require review by the Court at a later date." *Id.* (footnote omitted). Reversal of the Texas Supreme Court's opinion would not be preclusive of any further litigation on the Geyes' relevant causes of action because there has been no final decision by the state supreme court on all of the federal issues involved in this case.

If the Texas Supreme Court's judgment is reversed on the ground on which it is based and the judgment is remanded, then that court would be called upon further to determine which of Cyanamid's express warranties are label-related and therefore ostensibly preempted by FIFRA, and which of the warranties are not label-related and therefore not preempted by FIFRA. Its decision on remand will be just as much a "final judgment" as the judgment presently submitted for review. If the Texas Supreme Court were to hold that one or more of the express warranties is not related directly or indirectly to the product label's tank-mixing statement, then Cyanamid will have a second "final judgment" on which to petition for a writ of certiorari. *See Taylor Ag Indus. v. Pure-Gro,* 54 F.3d 555, 563 (9th Cir. 1995) ("FIFRA does not preempt claims for breach of an express warranty that fall outside the scope of the manufacturer's label"); *ISK Biotech Corp. v. Douberly,* 640 So.2d 85, 88 (Fla. Ct. App. 1994), *review denied,* 651 So.2d 1194 (Fla. 1995) (FIFRA does not preempt a claim for breach of an express warranty which "was entirely distinct from any representation made on the [product] label"); *M & H Enterprises v. Tri-State Delta Chems., Inc.,* 984 S.W.2d 175, 183 (Mo. Ct. App. 1998) (FIFRA does not preempt a claim for breach of an express

warranty which "was not a mere restatement of information contained in the [product's] EPA-approved labeling"); *Hughes v. Tennessee Seeds of Brownsville, Inc.*, 970 S.W.2d 471, 477 (Tenn. Ct. App. 1997) (FIFRA does not preempt a claim for breach of an express warranty which "exceeded or differed from the information contained in the product's label").

Any of Cyanamid's off-label representations that the state supreme court decides are not label-related can support not only the Geyes' claim for breach of express warranty, but also their multiple causes of action, *see App.* at 5a, for violations of the Texas Deceptive Trade Practices – Consumer Protection Act ("DTPA"), TEX. BUS. & COM. CODE, § 17.41, *et seq. See Cole v. Central Valley Chems., Inc.*, 9 S.W.3d 207, 210 (Tex.App. – San Antonio 1999, pet. denied) (FIFRA does not preempt claims for violations of the DTPA which "are not related directly or indirectly to labeling"). The Geyes' claims for strict liability and breach of implied warranty, *see App.* at 4a, also are actionable if they do not constitute attacks on the contents of Cyanamid's product labels. *See Quest Chem. Corp. v. Elam*, 898 S.W.2d 819, 820 (Tex. 1995) ("FIFRA does not . . . necessarily preempt state-law claims for strict liability or breach of implied warranty"). Whether any of the Geyes' causes of action are label-related is a question unanswered by the Texas Supreme Court.

The first requirement for invoking *Cox's* fourth exception – a final decision by the state courts on all federal issues – is totally absent.

B. Delaying Review of the Decision of the Texas Supreme Court Would not Seriously Erode Federal Policy

Even where the first prong of *Cox's* fourth exception is satisfied, "the question remains whether delaying review . . . would seriously erode federal policy within the meaning of [the Supreme Court's] prior cases." *Flynt v. Ohio,* 451 U.S. 619, 622 (1981). Delaying review of the state supreme court's decision in the present case would not seriously erode federal policy within the meaning of this Court's prior cases.

The federal policy in question – maintaining the national uniformity of pesticide product labels – is not of such importance that its possible disruption justifies the Court's attention at this stage of the proceedings. The policy pales in significance when compared to those policies that have merited the Court's prior consideration. Finality has been found as to otherwise interlocutory state court decisions that

- Imperiled federal control of national defense interests. *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174 (1988).
- Frustrated federal policy favoring arbitration. *Southland Corp. v. Keating,* 465 U.S. 1 (1984).
- Violated First Amendment rights. *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989).

In *Goodyear,* the Ohio Supreme Court's decision had "important implications for the regulation of federally owned nuclear production facilities in other States." 486 U.S. at 180. Delay in reviewing the California Supreme Court's ruling in *Southerland* would have "defeat[ed] the core purpose of a contract to arbitrate." 465 U.S. at 7-8. It

would have been "intolerable to leave unanswered . . . an important question of freedom of the press under the First Amendment." *Fort Wayne Books,* 489 U.S. at 56 (quoting *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247 n. 6 (1974)). By contrast, the case *sub judice* presents the unrealistic possibility that the label on a container of Prowl herbicide sold in Texas *might* bear a warning against tank-mixing this product with Pursuit herbicide, while the label on a container of Prowl sold in California *might not* bear the same warning. That is what the purported federal policy in question seeks to prevent.

The relative insignificance of the supposedly threatened federal policy is rivaled only by the insignificance of the threat. The crux of the Texas Supreme Court's decision is that "the EPA does not regulate product labeling with respect to a product's target area phytotoxicity. Thus the Geyes' crop-damage claim is not preempted." *Pet. App. A* at 11a. Thus the decision is limited to crop-damage claims involving target area phytotoxicity.[2]

Furthermore, the state court's decision will not impair the federal policy mandating national uniformity of

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[2] A broader FIFRA preemption issue is presented by another case that clearly is final. *See Netland v. Hess & Clark, Inc.,* 284 F.3d 895 (8th Cir. 2002), *petition for cert. filed* (U.S. Aug. 9, 2002) (No. 02-219). Cyanamid notes that "[t]he certiorari petition in *Netland* . . . asserts that the Court should review [the] fundamental, widely accepted FIFRA pre-emption principal" that § 136v(b) of FIFRA expressly preempts all state damage claims "that implicate the adequacy or accuracy of the information contained on EPA-approved product labeling." *Pet.* at 13 and n. 3. A grant of certiorari in *Netland,* if resolved in the *Netland* petitioner's favor, would necessarily defeat the defense of FIFRA preemption in crop-damage claims, thereby mooting the issues in the present case.

EPA-approved labels. Cyanamid's protestations to the contrary are founded upon a false premise: "the Texas Supreme Court's decision will erode that federal policy by allowing individual Texas state court juries to destroy national labeling uniformity through imposition of damages awards." *Pet.* at 3. Historical fact does not support this mere supposition. The case at bar is the most recent instance in which the FIFRA preemption defense, or some aspect of that defense, has been rejected by a state appellate court. *See ISK Biotech,* 640 So.2d at 88-89 (claims for breach of express warranty and strict liability not preempted); *Walker v. American Cyanamid Co.,* 948 P.2d 1123, 1128 (Idaho 1997) (claim for breach of express warranty not preempted); *Malone v. American Cyanamid Co.,* 649 N.E.2d 493, 498 (Ill. Ct. App.), *appeal denied,* 657 N.E.2d 624 (Ill. 1995) (claim for breach of implied warranty not preempted); *M & H Enterprises,* 984 S.W.2d at 182-83 (claim for negligent misrepresentation not preempted); *Sleath v. West Mont Home Health Servs., Inc.,* 16 P.3d 1042, 1053 (Mont. 2000), *cert. denied,* 122 S.Ct. 40 (2001) (claims for negligence, strict liability and breach of express warranty not preempted); *Brown v. Chas. H. Lilly Co.,* 985 P.2d 846, 853 (Or. Ct. App. 1999), *review denied,* 6 P.3d 1098 (Or. 2000) (claims for negligence and strict liability not preempted); *Hughes,* 970 S.W.2d at 476-77 (claims for breach of express warranty, breach of fiduciary duty and negligence not preempted); *Gorton v. American Cyanamid Co.,* 533 N.W.2d 746, 755 (Wis. 1995), *cert. denied,* 516 U.S. 1067 (1996) (claim for negligent misrepresentation not preempted). In the aftermath of at least one of these decisions, a jury verdict adverse to the pesticide manufacturer should have resulted in a revamped pesticide label customized for use only in the plaintiff's home State – if Cyanamid's premise is correct. No such

event has occurred. All potentially affected labels have remained nationally uniform.

There is a logical explanation for this continuing uniformity. If, for example, ISK Biotech had wished to change the label on its fungicide Bravo 720 due to the jury's finding that Bravo 720 damaged plaintiffs' watermelon crop, *see ISK Biotech,* 640 So.2d at 86-87, then it would have submitted the proposed label change to the EPA for approval. *See* 7 U.S.C. § 136j(a)(2)(A) (making it unlawful to alter EPA-approved labeling). Once the requested approval was obtained, the label would have been placed on every container of Bravo 720 sold anywhere in the United States. *See* 40 C.F.R. § 152.130(a) ("Distribution under approved labeling"). On the other hand, ISK Biotech, like Cyanamid in the present case, could have opted not to inform the EPA of the adverse effects caused by the use of its pesticide. Either way, the pesticide label would have remained nationally uniform in its content.

The second requirement for invoking *Cox's* fourth exception – the potentially serious erosion of federal policy – is totally absent.

II. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

This case does not involve the question of whether 7 U.S.C. § 136v(b) preempts claims relating directly or indirectly to labeling.[3] That query already had been answered affirmatively by the Texas Supreme Court in

[3] *See supra* note 2.

Quest, 898 S.W.2d at 820. *See Pet. App. A* at 13a. Indeed, the answer to that inquiry or to some variation of it has underpinned the decision in almost every case where the FIFRA preemption defense has been raised. *See, e.g., Andrus v. AgrEvo USA Co.,* 178 F.3d 395, 398 (5th Cir. 1999).

The ultimate substantive issue raised by this case is whether the congressionally authorized efficacy data requirement waiver found in 7 U.S.C. § 136a(c)(5) and implemented through 40 C.F.R. § 158.540 includes data pertaining to target area phytotoxicity. After extensively reviewing the relevant statutory and regulatory scheme, *see Pet. App. A* at 3a-10a, the Texas Supreme Court determined "that the EPA does not regulate product labeling with respect to a product's target area phytotoxicity." *Id.* at 11a. For this reason the court below concluded that FIFRA does not preempt the Geyes' crop-damage claim. *Id.* In addressing FIFRA's preemptive effect on crop-damage claims, the court acknowledged

> that many jurisdictions that have considered this issue have reached the opposite result [citing, *inter alia, Andrus,* 178 F.3d 395]. But all these cases are based on the premise that the EPA regulates whether products are toxic to target area crops. For example, the California Supreme Court considered the efficacy waiver in a case factually similar to ours – *Etcheverry v. Tri-Ag Serv., Inc.*[, 993 P.2d 366 (Cal. 2000)].
>
> The plaintiffs in *Etcheverry* claimed that applying two products, Guthion and Morestan, reduced its walnut production, resulting in about $150,000 in damages. The California Supreme Court held that the plaintiffs' crop-damage claims were preempted by FIFRA, concluding

> that the EPA's waiver of efficacy data was "beside the point" and "irrelevant" because the plaintiffs were complaining about *phytotoxicity* and not *efficacy*. But in so holding, the California Supreme Court did not draw the essential distinction between phytotoxicity and target area phytotoxicity that the EPA historically has.

Pet. App. A at 12a (footnotes omitted; emphasis in original). In other words, the California Supreme Court and the Texas Supreme Court were dealing with different concepts. The California court ruled that "phytotoxicity" was not "efficacy"; and the Texas court ruled that "target area phytotoxicity" was included within the EPA's definition of "efficacy." *See id.* at 6a ("Essential to this case, the EPA has also chosen to include 'target area phytotoxicity' within the concept of efficacy, and therefore the EPA has chosen not to collect data concerning 'target area phytotoxicity' ").

The decision below represents the first ruling by any appellate court regarding how the distinction made by the EPA between phytotoxicity and target area phytotoxicity is critical to determining the breadth of the congressionally created exception to FIFRA preemption. That part of the *Etcheverry* opinion construing FIFRA's efficacy data requirement waiver, § 136a(c)(5), did not reach the issue. *See Etcheverry,* 993 P.2d at 374-76. Moreover, most, if not all, of the other appellate decisions holding crop growers' claims preempted by FIFRA do not distinguish between efficacy and other types of claims, but rather apply the general majority rule that failure-to-warn claims are preempted by § 136v(b). *See, e.g., Andrus,* 178 F.3d at 398-400. Under these circumstances, the Texas Supreme Court's opinion addressed an issue of first impression. Its

decision, therefore, cannot be in conflict with *Etcheverry, Andrus,* or the prior decision of any other court.

III. THE DECISION BELOW IS CORRECT

In its petition, Cyanamid does not draw the essential distinction between phytotoxicity and target area phytotoxicity. Instead, Cyanamid attempts to counter four "glaring flaws," *Pet.* at 16, in the Texas Supreme Court's reasoning, but does so with meritless arguments.

First, Cyanamid contends that, although there are no EPA requirements concerning target area phytotoxicity, the state supreme court's opinion may result in a Texas jury imposing labeling requirements that are "'different from'" or "'in addition to,' those required under FIFRA by EPA." *Id.* (quoting 7 U.S.C. § 136v(b)). The same contention was considered and rejected by the Third Circuit Court of Appeals in a case involving packaging requirements under § 136v(b): "When no federal packaging requirements have been established, logic dictates that a state law packaging requirement cannot be different from or in addition to the absent federal requirement." *Hawkins v. Leslie's Pool Mart, Inc.,* 184 F.3d 244, 253-54 (3rd Cir. 1999); *accord Lucas v. Bio-Lab, Inc.,* 108 F.Supp.2d 518, 524 (E.D. Va. 2000); *Jeffers v. Wal-Mart Stores, Inc.,* 84 F.Supp.2d 775, 781 (S.D. W.Va. 2000); *Lyall v. Leslie's Poolmart,* 984 F.Supp. 587, 595 (E.D. Mich. 1997). Cyanamid's "in addition to or different from" argument is fatally flawed because "it is at odds with the statutory text of FIFRA's preemption clause, which forecloses only those State requirements for [labeling] that are 'in addition to or different from *those required under this subchapter.*' And 'those required under the subchapter' clearly means

requirements imposed by regulations promulgated by EPA under the authority conferred by Congress." *Lucas,* 108 F.Supp.2d at 524 (construing the packaging requirements preemption provision of § 136v(b)) (emphasis in original). Under the authority conferred by Congress in 1978, 7 U.S.C. § 136a(c)(5), the EPA has chosen not to establish any requirements pertaining to the efficacy of agricultural herbicides. 40 C.F.R. §§ 158.540 and 158.640. Therefore, none of the Geyes' state law claims is "in addition to or different from" those requirements which do not exist.

Second, Cyanamid insists that the efficacy data waiver found in § 136a(c)(5) "is not some sort of exemption from, or exception to, § 136v(b)." *Pet.* at 17. Because neither the text nor the legislative history of § 136a(c)(5) refers to § 136v(b), Cyanamid surmises that "[i]t seems highly unlikely that Congress would have intended the efficacy data waiver authorization to effect a major limitation on the otherwise broad pre-emptive scope of § 136v(b)." *Pet.* at 18. By applying this same reasoning to § 136v(b), it seems highly unlikely that Congress ever intended the FIFRA labeling and packaging uniformity statute to effect a major limitation on state damages claims. The text of § 136v(b) does not mention preemption of state damages claims, nor does FIFRA's extensive legislative history. *See, e.g.,* S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993.

Third, Cyanamid quotes *Etcheverry* for the proposition that "'[a]lthough the EPA has waived the submission of efficacy data for agricultural pesticides at the time of their initial registration, the agency does require and review such data if efficacy-related problems develop later.' *Etcheverry,* 993 P.2d at 375." *Pet.* at 18. The extent of the EPA's exercise of its discretionary authority is overstated

by the *Etcheverry* court. The EPA has the authority to demand or not to demand the pre-registration submission of efficacy data. It has opted to waive this requirement. The fact that the agency also has the authority to demand or not to demand – "reserves the right to require," 40 C.F.R. § 158.640(b)(1) – the post-registration submission of efficacy data does not, *ipso facto,* create data submission "requirements." The decision to require the submission of efficacy data is left to the discretion of the EPA at all times.

Fourth, Cyanamid accuses the Texas Supreme Court of failing to recognize the possibility that the EPA's "'decision to forego regulation in a given area may imply an authoritative determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision to regulate.'" *Pet.* at 20 (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 384 (1983)) (emphasis in original). Cyanamid's pure speculation as to the EPA's motive for not regulating product efficacy fails to acknowledge this Court's admonition that the quoted excerpt from the *Arkansas Electric* opinion "was obviously not meant in an unqualified sense; otherwise, deliberate federal inaction could always imply pre-emption, which cannot be." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495, 503 (1988) (construing *Arkansas Elec.,* 461 U.S. at 384). "In this case, however, nothing in the language, history, or policy of [FIFRA] suggests [the] conclusion," *Arkansas Elec.,* 461 U.S. at 384, that the EPA intended to regulate pesticide efficacy through inaction; and Cyanamid has cited no authority to the contrary.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 35,851

TERRY GEYE and BRANDON GEYE	*	**IN THE DISTRICT COURT OF**
VS.	*	**EASTLAND COUNTY, TEXAS**
AMERICAN CYANAMID COMPANY	*	**91ST JUDICIAL DISTRICT**

PLAINTIFFS' THIRD AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

TERRY GEYE and BRANDON GEYE, Plaintiffs, file this Third Amended Original Petition against AMERICAN CYANAMID COMPANY, Defendant, for the following reasons:

1. Service of Process

Defendant, AMERICAN CYANAMID COMPANY, is a Maine corporation which has been served and has answered herein.

2. Statutory and Common Law Authority

This suit is brought pursuant to Tex Bus. and Com. Codes, Section 17.41 *et seq.*, commonly known as the Deceptive Trade Practices and Consumer Protection Act and cited in this petition as the "DTPA." This suit is also brought by reason of breach of express and implied warranty, and in strict liability by reason of the defective and unreasonably dangerous nature of the Defendant's herbicide products.

3. Venue

Venue of this action is proper in the County of suit because this cause of action accrued in whole or in part in Eastland County, Texas.

4. Notice: Conditions Precedent

(A) Defendant was given notice in writing of the claims made in this petition including a statement of Plaintiffs' actual damages and expenses including attorney's fees more than sixty (60) days before this suit was filed in the manner and form required by DTPA, Section 17.505(a).

(B) All conditions precedent necessary to maintain this action have been performed or have occurred.

5. Factual Circumstances

This lawsuit arises out of the purchase by Plaintiffs of certain herbicides known as "Pursuit" and "Prowl" for use in controlling weeds in the Plaintiffs 1993 peanut crop grown on their farms situated in Eastland and Brown Counties in the State of Texas. The Defendant, AMERICAN CYANAMID COMPANY is engaged in the manufacturing, packaging and distribution of these herbicide products to be used in such agricultural applications. Defendant placed its Pursuit and Prowl products into the stream of commerce.

AMERICAN CYANAMID COMPANY advertised such products in brochures and magazine advertisements as follows:

(1) "A sound choice for crop safety;"

(2) Does "not cause injury to peanuts;"

(3) "Safe to use on all peanut varieties;"

(4) "Pursuit® can be tank mixed with other popular products such as Prowl® herbicide;"

(5) Pursuit® provides "superior control. . . without injury to young peanut plants;"

(6) "Ideal for peanuts;"

(7) You can with Pursuit® control nutsedge "without injuring young peanut plants;"

(8) "Prowl® is gentle on young peanut plants and won't interfere with pegging;"

(9) "Clean fields and crop safety mean higher yields;"

(10) "This season get weed control and more peanuts. Get Prowl® herbicide."

All such representations substantially differed from, went beyond and were extrinsic of the label on the Prowl® and Pursuit® containers.

At the time of the Plaintiffs' purchase of the herbicides, these products were in sealed containers and were in the same condition as originally manufactured and sold. The Plaintiffs followed proper procedures in the application of the products in question on their peanut fields. The herbicides, instead of controlling the weeds in a safe and effective manner as intended and as advertised, caused damage to the Plaintiffs' peanut plants to the extent that the peanuts failed to properly grow and produce. Plaintiffs would show that the herbicide damage prevented the

peanuts from producing harvestable nuts which were to be expected under the circumstances for the crop year in question and which were similar to that produced by the Plaintiffs' fields which were not treated with a tank mixture combination of Prowl® and Pursuit® herbicide.

6. Causes of Action

The facts set forth in the preceding paragraph give rise to the following causes of action:

(A) The herbicides in question were defective and unsafe for their intended purposes for a combined tank mixture application at the time they left the control of Defendant AMERICAN CYANAMID COMPANY and at the time they were sold to the Plaintiffs. The products in question were unreasonably dangerous to the Plaintiffs' peanut crops and, did indeed cause herbicide damage to the Plaintiffs' crops. Accordingly, the Plaintiffs are entitled to recover under strict liability in tort.

(B) The Defendant also represented through non-label advertising and promotional material, as hereinabove described, that the products in question were safe and appropriate for utilization as a herbicide in peanut crops. In actuality, the herbicides in question were not appropriate for utilization in peanut crops as used and the herbicides in question were inherently dangerous to the Plaintiffs' peanut crop. Such is a breach of the express warranties which have heretofore been described. Additionally, the Defendant impliedly warranted to consumers that the herbicides were of merchantable quality and were safe and fit for the purposes intended when they were not.

(C) Plaintiffs would further show that the conduct of the Defendant is in violation of Section 17.50(a)(1); Section 17.50(a)(2); Section 17.50(a)(3); Section 17.46(b)(5); and Section 17.46(b)(7) of the DTPA. In this regard, Defendant's unconscionable conduct vitiates the written disclaimers and limitations of liability by which Defendant has sought to evade and escape its legal responsibilities.

7. Knowing Conduct

Defendant's hereinabove described conduct was committed "knowingly," as that term is defined in Section 17.45(9) of the DTPA. Prior to the transaction on which this lawsuit is based, Defendant had actual awareness of claims and complaints involving crop damage allegedly attributable to the herbicides in question. However, Defendant continued to make the representations and warranties of which Plaintiffs complain.

8. Causation: Actual Damages

(A) The conduct described in the preceding paragraphs was the producing and proximate cause of actual damages sustained by the Plaintiffs. The amount of Plaintiffs' damages exceed the minimum jurisdictional limits of the Court.

(B) The actual damages incurred by the Plaintiffs include the difference between the value of the peanuts that would have been produced without the use of the herbicides, or which were damaged because of the herbicides, and what was actually produced. Such losses exceed the sum of $200,000.00.

(C) Plaintiffs also seek recovery of all sums that they paid for the herbicides in question.

9. Additional Statutory Damages

Plaintiffs are entitled to recover two times that portion of their actual damages which do not exceed $1,000.00 and not more than three times the amount of their actual damages in excess of $1,000.00, all as allowed by Section 17.50(b)(1) of the DTPA as in effect at that time.

10. Attorney's Fees

Plaintiffs seek recovery of all reasonable and necessary attorney's fees in this case including attorney's fees incurred for preparation and trial of this lawsuit, post trial, pre-appeal legal services and for an appeal to the Court of Appeals as well as making or responding to a Petition for Review to the Supreme Court of the State of Texas, and an appeal to the Supreme Court of the State of Texas in the event such a Petition is granted.

11. Request for Relief

(A) Plaintiffs request that Defendant be cited according to law to appear and answer.

(B) Plaintiffs demand judgment against the Defendant for all actual damages and attorney's fees and all statutory additional damages as set forth above, costs of court, and prejudgment and post judgment interest at the highest lawful rate.

(C) Plaintiffs also ask for such other relief which the Plaintiffs may be justly entitled to receive.

12. Demand for Jury

Plaintiffs demand a jury trial. Plaintiffs' jury fee has been timely paid.

Respectfully submitted,

/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served on opposing counsel and all counsel of record on the 14th day of August, 1998, in accordance with the Texas Rules of Civil Procedure.

/s/_____
Kerwin B. Stephens

MOTION FILED
OCT 2 2002

No. 02-367

In the Supreme Court of the United States

AMERICAN CYANAMID COMPANY,

Petitioner,

v.

TERRY GEYE AND BRANDON GEYE,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

MOTION OF CROPLIFE AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, CropLife America moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondents has withheld consent.

CropLife America is a national, not-for-profit trade association that promotes the environmentally sound use of crop protection products (including herbicides, insecticides, fungicides, and other types of pesticides) for the economical production of safe, high quality, and abundant food, fiber, and other crops. Established in 1933, CropLife America (formerly known as the American Crop Protection Association and, before that, as the National Agricultural Chemicals Association) represents the developers, manufacturers, formulators, and distributors of plant science solutions for agricultural and pest management in the United States. The association's members produce, sell, and distribute virtually all of the crop protection and biotechnology products used by American farmers.

CropLife America often participates as *amicus curiae* in cases that raise issues of vital concern to its membership. This is such a case. CropLife America's members have a substantial interest in ensuring that questions concerning the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y, are properly resolved. For that reason, CropLife America filed an *amicus* brief in this case when it was before the Texas Supreme Court, and has filed *amicus* briefs in other FIFRA preemption cases as well. See, *e.g.*, *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991); *Hart* v. *Bayer*, 199 F.3d 239 (5th Cir. 2000); *Etcheverry* v. *Tri-Ag Servs., Inc.*, 993 P.2d 366 (Cal. 2000). CropLife America has also submitted *amicus* briefs in cases in this Court that raised other issues of importance to its members. See, *e.g.*, *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred International, Inc.*,

534 U.S. 124 (2001); *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

CropLife America's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF FOR CROPLIFE AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

ARGUMENT

In enacting the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y, Congress vested the United States Environmental Protection Agency ("EPA") with broad and exclusive authority to regulate the labeling and packaging of pesticides sold in this country. See *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 615 (1991) (explaining that labeling "fall[s] within an area that FIFRA's 'program' pre-empts"). Toward that end, Congress included in FIFRA a broad preemption clause – aptly titled "uniformity" – that expressly bars the States from imposing on federally registered pesticides "*any* requirements for labeling or packaging" that are either "in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (emphasis added). Congress intended Section 136v(b) "to *completely preempt* state authority in regard to labeling and packaging." H.R. Rep. No. 92-511, at 16 (1971) (emphasis added).

In the decision below, the Texas Supreme Court has parted ways with the Supreme Court of California and several federal circuits in resolving an issue of surpassing importance to the manufacturers and distributors of pesticides, to farmers, and ultimately to the consumers of agricultural products: Does FIFRA preempt labeling-related damages claims for crop injury

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[1] Pursuant to Rule 37.6 of the Rules of this Court, CropLife America states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

that are brought under state law? In holding categorically that such claims are *not* preempted, the Texas Supreme Court has created a serious conflict over the meaning of an important federal statute and impaired the national uniformity of pesticide labeling mandated by Congress. That alone merits this Court's review.

But there is more. In reaching this anomalous result, the Texas Supreme Court purported to find an "exception" (Pet. App. 1a) to FIFRA's clear preemptive command, relying on the ground that the expert federal agency charged with regulating pesticide labeling – the EPA – supposedly had chosen not to regulate a particular aspect of the product labeling challenged by respondents' claims. As we explain below, Congress did not create any such "exception" to FIFRA's preemption provision; nor did it authorize the EPA to grant "exemptions" from preemption. Unlike other preemption schemes that have those features, FIFRA is unqualified in its preemption of state-imposed "requirements" for the labeling or packaging of federally registered pesticides. By concluding otherwise based on an inquiry into whether the EPA, at the time of initial product approval, examined data relating to specific product risks, the Texas Supreme Court's decision threatens to interject uncertainty into this important area of federal law as well as invite further, wholly unnecessary litigation. For that reason as well, this Court should grant the petition in this case.

Before examining these reasons in greater detail, however, we first explain why this Court has jurisdiction even though the Texas Supreme Court's decision remanded the case for further proceedings in the state courts.

I. THIS COURT HAS JURISDICTION TO REVIEW THE TEXAS SUPREME COURT'S DECISION

This Court's certiorari jurisdiction over decisions of the state courts is conferred by 28 U.S.C. § 1257, which authorizes review of any "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had." The

Court has long eschewed a "mechanical" interpretation of the requirement of "finality." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). Instead, the Court has applied an "intensely practical approach" to determining "finality." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976); see also *Cox Broadcasting*, 420 U.S. at 478 & n.7 ("[T]he requirement of finality is to be given a practical rather than a technical construction.") (internal quotations omitted). See generally R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 145, 152-154 (8th ed. 2002) ("STERN & GRESSMAN").

In *Cox Broadcasting*, this Court took note of "at least four categories of * * * cases" in which, for practical reasons, it has elected to treat decisions of the state courts as "final" even though "there [we]re further proceedings in the lower state courts to come." 420 U.S. at 477. As petitioner correctly points out (Pet. 1-3), this case falls squarely within the fourth category recognized in *Cox Broadcasting*. That category consists of cases in which (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; and (3) "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-483.

Each of those conditions is satisfied here. *First*, the FIFRA preemption issue was fully considered – and squarely resolved – in the decision below by the highest court of Texas. And, if review is denied, it is at least possible that petitioner eventually will prevail on the merits at trial on nonfederal grounds.

Second, if this Court were to grant review and reverse the Texas Supreme Court by holding that FIFRA preempts respondent's labeling-related claims under state law for

agricultural crop injury, that action would bring this litigation to an end. As American Cyanamid correctly points out (see Pet. 3, 6, 8), both the trial and the intermediate appellate court in Texas ruled that *all* of respondents' claims are labeling-related and the Texas Supreme Court in no way disturbed or questioned that finding. See also Pet. App. 16a, 24a, 28a.[2]

Third, the federal policy underlying FIFRA and its preemption clause would be seriously undermined if this Court declines to exercise immediate review. As its title suggests, FIFRA's express preemption clause is aimed at ensuring nationwide "uniformity" in the labeling and packaging requirements applicable to federally registered pesticides. See 7 U.S.C. § 136v(b). The decision below destroys that uniformity by allowing state juries in Texas – one of the leading agricultural States in the nation – to impose additional or different labeling requirements on manufacturers in private lawsuits.

In similar circumstances, this Court has repeatedly applied *Cox Broadcasting* to grant immediate review. For example, in *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), the Court considered whether a decision of the Federal Energy Regulatory Commission allocating the cost of constructing a nuclear plant among four utility companies preempted a state regulator from examining the prudence of constructing the plant. *Id.* at 356. The state supreme court had ruled that a pru-

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[2] This feature of the litigation below distinguishes it from other FIFRA preemption decisions rendered by state courts that this Court, in its discretion, has elected not to review. For example, in *Sleath* v. *West Mont Home Health Services*, 16 P.3d 1042 (Mont. 2000), cert. denied, 122 S. Ct. 40 (2001), the respondent maintained that a reversal on the preemption issue would not terminate the entire lawsuit. See No. 00-1674 Br. in Opp. 6-7. *Sleath* is also distinguishable, of course, because it did not raise the same issues presented here. Compare No. 00-1674 Pet. i with No. 02-367 Pet. i, 13 & n.3.

dence inquiry by state regulators was not preempted and had remanded the case to state regulators to conduct such an inquiry. See *id.* at 368. Despite the pendency of those state proceedings, this Court held that the state supreme court's decision was "final" under *Cox Broadcasting*: "The critical federal question – whether federal law pre-empts such [state regulatory] proceedings while the FERC order remains in effect – has * * * already been answered by the State Supreme Court and its judgment is therefore ripe for review." *Id.* at 370 n.11.

Similarly, in *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988), the Court granted certiorari to decide whether the State of Ohio had violated the Supremacy Clause by subjecting a private contractor operating a federally owned nuclear production facility to a state workers' compensation law giving employees higher awards for injuries resulting from a violation of state safety standards. *Id.* at 176. The Ohio Supreme Court had held that federal law did not preempt Ohio from applying state safety requirements unrelated to radiation hazards to nuclear facilities; accordingly, the state industrial commission was ordered, on remand, to consider the merits of the employee's claim. See *id.* at 177-178. Despite the pendency of these state proceedings, immediate review was granted because the case fell within the "fourth category" recognized in *Cox Broadcasting*. *Id.* at 179. As the Court emphasized, leaving the Ohio Supreme Court's decision unreviewed would have threatened to undermine vital federal policies. *Ibid.* The state court decision "sanction[ed] direct state regulation" of the nuclear facility involved in the case and had "important implications for the regulation of federally owned nuclear production facilities in other States." *Id.* at 179-180.[3]

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[3] The Court's statements about the importance of the federal interest implicated appear in the same opinion in which the Court rejected the argument for preemption and affirmed the state supreme court's judgment. By simultaneously recognizing for jurisdictional purposes the importance of the federal interests involved, and deciding that those federal interests would *not* prevail in the preemption analysis on

Mississippi Power & Light and *Goodyear Atomic* are just two examples of a long line of cases granting immediate review of state court preemption decisions despite pending state proceedings. In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), this Court applied *Cox Broadcasting* to review a state-court decision that the Federal Arbitration Act did not preempt state law claims under the California Franchise Investment Law; although such claims had not yet been tried on the merits, the Court recognized the state court's decision as "final." *Id.* at 6-7. In *Belknap* v. *Hale*, 463 U.S. 491, 497 n.5 (1983), and *Local No. 438 Construction & General Laborers Union* v. *Curry*, 371 U.S. 542, 548-551 (1963), this Court reviewed state-court decisions regarding the preemptive scope of the National Labor Relations Act even though both state-court decisions contemplated further proceedings below.

In several cases, this Court has also exercised jurisdiction over state-court decisions that rejected preemption arguments under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a). See, *e.g.*, *Ingersoll-Rand Co.* v. *McLendon*, 498 U.S. 133 (1990) (reviewing decision of Texas Supreme Court that had held that ERISA does not preempt state wrongful-discharge claims and had remanded for trial); *United States Healthcare Systems of Pa.* v. *Pennsylvania Hosp. Ins. Co.*, 530 U.S. 1241 (2000) (order) (granting, vacating, and remanding state court decision in similar posture). In *United States Healthcare*, this Court invited the Solicitor General to file an *amicus* brief at the petition stage. See 528 U.S. 804 (1999). In his brief, the Solicitor General agreed with petitioner that this Court had jurisdiction under 28 U.S.C. § 1257 to review the Pennsylvania Supreme Court's decision rejecting ERISA preemption even though there were further proceedings to come in the state courts. See No. 98-1836 U.S. Br. 7 n.4 (arguing that

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the merits, the Court in *Goodyear Atomic* demonstrated that the *Cox Broadcasting* inquiry does not require an evaluation of the merits. It is enough that important federal interests are *implicated*.

"this case meets the * * * requirements for immediate review under *Cox Broadcasting*") <available at http://www.usdoj.gov/osg/briefs/1999/2pet/6invit/98-1836.pet.ami.inv.html>.

As with each of these preemption cases, the decision below fits comfortably within the fourth *Cox Broadcasting* category. The Texas Supreme Court's decision is certainly no less damaging or destructive to federal policy than were the other state preemption decisions this Court has treated as final and reviewed under *Cox Broadcasting*. As the Solicitor General told this Court in *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991),

> [A]n exclusive federal approach is *necessary* in certain areas of pesticide regulation. One such area is labeling. Due to the burden on commerce that would be imposed by different labeling requirements in States and localities across the country, Congress *clearly preempted all but federal regulation of labels*.

No. 89-1905 U.S. Br. 22 (emphasis added). Accord H.R. Rep. No. 92-511, at 16 (1971) (Congress "intended to completely preempt state authority in regard to labeling and packaging").

Finally, under the Court's "intensely practical approach" to finality issues (*Mathews*, 424 U.S. at 331 n.11), the decision below is in every practical sense the final word of Texas's highest court. This is not a case in which the highest court of a State has declined to entertain a discretionary interlocutory appeal, leaving in place the decision of an intermediate state appellate court that might be subject to review, and correction, by the state supreme court in some future appeal. Compare *California* v. *Rooney*, 483 U.S. 307, 314 (1987) (per curiam). In the decision below, the Texas Supreme Court considered, and squarely resolved, the preemption issues raised in American Cyanamid's petition for certiorari. Any revisitation of those issues in some distant return trip of this case to the Texas Supreme Court would have to await the resolution of the merits of this case (perhaps following a full trial) as well as overcome

the high hurdle presented by the law-of-the-case doctrine. See *LeBlanc* v. *State*, 826 S.W.2d 640, 644 (Tex. App. – Houston [14th Dist.] 1992) (law-of-the-case doctrine bars relitigation in all but "exceptional or urgent situations").

In the meantime, other manufacturers, formulators, and distributors of herbicides, insecticides, fungicides, and other types of pesticides in Texas will remain subject to the erroneous rule of law adopted in the decision below. Nor is there any realistic possibility that the Texas Supreme Court will reverse its decision in this case, which was unanimous. In these circumstances, it would "serve[] the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine" the preemption question "now * * * rather than to subject [petitioner] * * * to long and complex litigation which may all be for naught if consideration of the preliminary question * * * is postponed until the conclusion of the proceedings." *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963).[4]

II. THE CONFLICT IN THE LOWER COURTS IS SERIOUS AND WARRANTS THIS COURT'S ATTENTION

As the petition for certiorari demonstrates (at 8-14), the Texas Supreme Court's decision in this case squarely conflicts with the California Supreme Court's decision in *Etcheverry* v. *Tri-Ag Servs., Inc.*, 993 P.2d 366 (Cal. 2000), a case the lower court accurately described as "factually similar." Pet. App. 12a. In fact, the Texas Supreme Court candidly "acknowledge[d] that *many* jurisdictions" – not just California – "have reached the opposite result" on the question whether FIFRA preempts

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[4] This Court has often relied on such pragmatic considerations in assessing "finality" under 28 U.S.C. § 1257. For example, in *Langdeau* this Court exercised review over a decision of the Texas Supreme Court upholding a trial court's rejection of a threshold objection to venue. Thus, there is ample precedent – in both preemption and non-preemption cases – for this Court's exercise of jurisdiction in this case.

labeling-related claims for crop injury predicated on state law. Pet. App. 12a & n.45 (emphasis added) (citing as examples the Fifth Circuit's opinion in *Andrus* v. *AgrEvo USA Co.*, 178 F.3d 395 (1999), as well as decisions of the Fourth, Seventh, Eighth, and Ninth Circuits). Not only did the Texas Supreme Court flatly disagree with the holdings of *Etcheverry*, the other federal cases cited in the opinion below, and scores of other state and federal authorities that have upheld preemption in this setting (see Pet. 12), but also it squarely rejected the rationale underlying the California Supreme Court's decision. See Pet. App. 12a (criticizing *Etcheverry* for failing to "draw the essential distinction between phytotoxicity and target area phytotoxicity").

The conflict in the lower courts is thus clear (and was expressly acknowledged by the Texas Supreme Court in this case). This Court has often granted review to resolve conflicting results reached by the highest courts of two or more States over the meaning of a federal statute. See STERN & GRESSMAN, *supra*, at 240, 272 (citing numerous cases). At least three features of the conflict created by the decision below, moreover, make it especially deserving of this Court's attention at this time.

First, as American Cyanamid correctly notes (Pet. 8-9 & n.1), Texas and California are the two largest States in terms of agricultural production. At the time of the last full agricultural survey conducted in 1997, they together accounted for almost a fifth of the entire agricultural output of the United States. See 2 U.S. DEPT OF AGRICULTURE, 1997 CENSUS OF AGRICULTURE 27 (table 23) (Texas and California combined had production of $36.8 billion out of the nation's $196.9 billion) ("1997 CENSUS"). Not surprisingly, California and Texas rank first and second, respectively, in net farm income. See ECONOMIC RESEARCH SERVICE, U.S. DEPT. OF AGRICULTURE, AGRICULTURAL INCOME AND FINANCE OUTLOOK 36-37 (tables 1-2) (Sept. 25, 2001). As of 1997, there were approximately 270,000 farms in Texas and California; and more than 25% of all irrigated farmland in the United States was located in those two States.

See 1997 CENSUS 4 (table 1). In 1995 alone, Texas farmers and ranchers spent $376 million on pesticides. See Texas Environmental Profile <available at http://www.texasep.org/html/pes/pes_2tex.html >.

The importance of the preemption issue presented in this case is thus not limited to the many developers, manufacturers, formulators, and distributors of herbicides and other pesticides who make up CropLife America's membership. The issue presented also is vitally important to farmers who depend on these products and to the national agricultural economy. The Texas Farm Bureau, on behalf of its "308,526 members" in Texas, filed an *amicus* brief in this case in the Texas Supreme Court urging that crop injury claims be spared from preemption under FIFRA. See *Amicus Curiae* Brief (Corrected) of Texas Farm Bureau in Support of Plaintiffs/Appellees, *American Cyanamid Co.* v. *Geye*, No. 01-1008 (Tex.), at iv. (The California Farm Bureau Federation counts "95,000 * * * families" among its members. See <http://www.cfbf.com/about/default.htm>.) Other groups have also participated in cases raising the FIFRA preemption issue involved here. See *Amicus* Brief of California Rural Legal Assistance, Inc., *Etcheverry* v. *Tri-Ag Service, Inc.*, No. S072524 (Cal.), at 1 (expressing concern about impact of FIFRA preemption issue on farm workers).

There is simply no good reason why federal law should be understood to preempt labeling-related crop injury claims brought in the California courts but leave untouched similar claims brought in the Texas courts. Federal statutes should have the same meaning everywhere in the country, and should not vary depending on geographical happenstance. And it is difficult to believe that the same Congress that placed such a premium on national uniformity in pesticide labeling and packaging would view as tolerable the nonuniform scheme that now exists, under which the duties of pesticide manufacturers and the rights of pesticide users hinge on random geographical variables. To resolve the clear disagreement between the highest courts of the two largest agricultural States over this

important question of federal law, review by this Court is needed.

Second, the decision below also squarely conflicts with the Fifth Circuit's decision in *Andrus*. When a decision of the highest court of a State conflicts with a decision of the federal circuit in which that State is located, this Court has often granted review. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994) (conflict between Utah Supreme Court and Tenth Circuit); *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992) (conflict between Ninth Circuit and California state courts); *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985) (describing conflict between Alabama Supreme Court and Eleventh Circuit as "significant").[5] Because conflicts of this kind give rise to a serious risk of forum-shopping, they are especially deserving of this Court's attention. *Yee*, 503 U.S. at 538. The risk of forum-shopping in crop-damages cases is very real, since plaintiffs usually can defeat removal based on diversity through the simple expedient of naming an in-state distributor or retailer as a co-defendant. And, of course, the potential for forum-shopping is greatly accentuated where a state justice system has a reputation for producing windfall verdicts against out–of-state corporate defendants.

Third, Texas and the Fifth Circuit unfortunately are not the only pairing of state and federal courts within the same jurisdiction that treat crop injury claims differently under FIFRA's preemption clause. The same can be said for the state and federal courts in another important farm State: Wisconsin. Compare *Gorton* v. *American Cyanamid Co.*, 533 N.W.2d 746, 753-56 (Wis. 1995) (holding that negligent misrepresentation claim under Wisconsin law in crop injury case was not preempted by

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[5] Currently on the Court's docket are *Ewing* v. *California*, No. 01-6978, and *Lockyer* v. *Andrade*, No. 01-1127, both scheduled for argument November 5, 2002, in which the Court will review conflicting decisions of the Ninth Circuit and the California Court of Appeal, Second District.

FIFRA), cert. denied, 516 U.S. 1067 (1996) with *Kuiper* v. *American Cyanamid Co.*, 131 F.3d 656, 661 (7th Cir. 1997) (declining to apply rule of *Gorton* in part because that case "conflicts with other FIFRA preemption cases" and holding that FIFRA preempts misrepresentation claims based on off-label communications), cert. denied, 523 U.S. 1137 (1998).

Moreover, at least two state appellate courts have concluded – contrary to a vast body of federal and state case law reaching the opposite conclusion – that FIFRA does not preempt *any* common law claims. See *Sleath* v. *West Mont Home Health Services*, 16 P.3d 1042 (Mont. 2000), cert. denied, 122 S. Ct. 40 (2001); *Brown* v. *Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999), rev. denied, 6 P.3d 1098 (Or. 2000). These decisions are patently incorrect, rest on a fundamental misreading of this Court's decision in *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), and have been harshly criticized. See, *e.g.*, *Eyl* v. *Ciba-Geigy Corp.*, 650 N.W.2d 744, 753-754 (Neb. 2002); *Netland* v. *Hess & Clark*, 284 F.3d 895, 899 & n.4 (8th Cir. 2002), pet. for cert. filed, 71 U.S.L.W. 3138 (Aug. 9, 2002) (No. 02-219).[6] Nevertheless, they do have the practical effect of ensuring that labeling-related claims for crop injuries are *not* preempted in cases filed in the Montana and Oregon state courts. In sharp contrast, such claims *are* preempted by FIFRA in the federal courts in those two States. See *Taylor AG Industries* v. *Pure-Gro*, 54 F.3d 555 (9th Cir. 1995).

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[6] For several reasons, this case is a better vehicle for clarifying the scope of FIFRA preemption than is *Netland*. To begin with, as American Cyanamid points out (Pet. 13 n.3), the petition in *Netland* raises a different issue on which there is virtual unanimity in the lower courts. In addition, if this Court were to grant review in *Netland* and affirm (a result consistent with the great weight of authority in the lower courts), that would leave unresolved the serious conflict in the lower courts over the treatment of crop-injury claims that is raised in this case. Finally, *Netland* presents an unusual fact pattern (because it involves clear misuse of the product).

In light of these serious discrepancies in the treatment of crop injury litigation, review by this Court is needed to bring uniformity to the important questions of federal law presented in American Cyanamid's petition. If left uncorrected, the Texas Supreme Court's decision will subvert Congress's judgment – expressed in FIFRA's preemption clause – that labeling for crop protection pesticides should be nationally uniform. Such uniformity ensures that farmers in every State receive the same information, based on labeling that has been approved by an expert federal regulator (rather than by judges or lay juries in the States). It also allows manufacturers to distribute a single product in the national market for a particular crop rather than incurring the unwarranted expense (which would be passed on at least in part to pesticide users in the form of higher prices) of designing different labels for each of the 50 States. And, of course, the protection provided to manufacturers by FIFRA's preemption clause serves the longstanding federal policy of ensuring that pesticides remain available to farmers and other consumers even for smaller-volume crops (including in States marred by a proven track record of runaway jury verdicts).[7]

III. THE DECISION BELOW IS WRONG AND, IF LEFT UNCORRECTED, COULD SPAWN ADDITIONAL UNCERTAINTY AND WASTEFUL LITIGATION OVER THE SCOPE OF FIFRA PREEMPTION

In holding that respondents' claims are not preempted by FIFRA, the Texas Supreme Court purported to rely on a "congressionally created *exception* to [FIFRA's] express preemption" of state labeling and packaging requirements. Pet. App. 1a (emphasis added); see also *id.* at 14a. According to the lower court, Congress "authorized the EPA in 1978 to choose

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[7] See, *e.g.*, U.S. DEPT. OF AGRICULTURE, ANNUAL REPORT 2001: INTERREGIONAL RESEARCH PROJECT NO. 4, A NATIONAL AGRICULTURAL PROGRAM TO CLEAR CROP PROTECTION CHEMICALS AND BIOLOGICAL PEST CONTROL AGENTS FOR MINOR USE, at i (discussing federal policy).

not to require the submission of data" relating to pesticide "efficacy" (*id.* at 5a (citing 7 U.S.C. § 136a(c)(5)); the agency, "acting under this authorization, has chosen not to collect efficacy data" for most products (including Pursuit and Prowl, the two pesticides at issue in this case) (*ibid.*); and EPA has further "chosen to include 'target area phytotoxicity' within the concept of efficacy" (*id.* at 5a-6a). Thus, the lower court reasoned, EPA has "exercised no regulatory authority over" the portion of American Cyanamid's label "that specifically allowed the tank mixing of Pursuit and Prowl." *Id.* at 8a. Because FIFRA expressly preempts state labeling requirements only "to the extent that the content of the product label is regulated" by EPA, the court held, there was no preemption of respondents' claims. *Id.* at 1a; see also *id.* at 12a-13a, 14a.

That analysis is flawed at every turn. To begin with, FIFRA's express preemption provision, 7 U.S.C. § 136v(b), contains no exceptions. On the contrary, the preemption clause provides broadly and without qualification that the States "shall not impose or continue in effect *any* requirements for labeling or packaging" that are either "in addition to or different from those required under this subchapter." *Ibid.* (emphasis added). Contrary to the Texas Supreme Court's suggestion, Congress's decision to amend FIFRA in 1978 (six years after the preemption provision was enacted) by adding language in Section 136a(c)(5) authorizing the EPA to "waive data requirements pertaining to efficacy" does not create an exception to express preemption under Section 136v(b). See *Etcheverry* v. *Tri-Ag Servs., Inc.*, 993 P.2d 366, 375-376 (Cal. 2000). In fact, Section 136a(c)(5) says nothing at all about preemption; it concerns instead which pesticides may be "register[ed]" by EPA. Nor is there evidence that Congress intended, in amending FIFRA by adding the pertinent language of Section 136a(c)(5), to create an exception to express preemption. In short, there is no basis in the text or legislative history

of the statute for the novel exception created by the Texas Supreme Court.[8]

Moreover, Congress knows full well how to carve out exceptions to express preemption commands and has done so in many other statutes. For example, the express preemption provision of the Federal Boat Safety Act generally bars States from "establish[ing], continu[ing] in effect, or enforc[ing]" any "law or regulation" that either "establish[es] a recreational vessel or associated equipment performance or other safety standard" or "impos[es] a requirement for associated equipment," but it contains an "except[ion]" allowing States to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State" in the absence of "disapproval" by the federal government. 46 U.S.C. § 4306. Similarly, Congress included in the express preemption provision of the Flammable Fabrics Act, 15 U.S.C. § 1203(b), an exception for state flammability standards that "afford a higher degree of protection" than do the federal standards. Such exceptions are quite common. *E.g.*, 15 U.S.C. § 1476(b); *id.* § 6715; 49 U.S.C. § 20106. See also *City of Columbus* v. *Ours Garage and Wrecker Service, Inc.*, 122 S. Ct. 2226, 2230 (2002) (interpreting "exception" to preemption set forth in 49 U.S.C. § 14501(c)(2)(A)).

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[8] Section 136v(a) of FIFRA, which immediately precedes the express preemption clause, does not create an exception to Section 136v(b)'s preemption of labeling-related state requirements. See 7 U.S.C. § 136v(a) ("A State may regulate the *sale or use* of any federally registered pesticide * * * in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.") (emphasis added). In fact, Congress regarded Section 136v(a) as a "partial[] preempt[ion]" provision in its own right. H.R. Rep. No. 92-511, at 2 (1971); accord *id.* at 16 (referring to the "preemption provisions" of the bill) (emphasis added). Nor did the Texas Supreme Court rely on Section 136v(a) in its analysis.

Equally unfounded was the Texas Supreme Court's suggestion that the EPA, by "choos[ing] NOT to regulate product labeling with respect to how well a product works" – and, in particular, the labeling's statements concerning the product's "target area phytotoxicity" – had effectively *exempted* state labeling requirements dealing with that subject from FIFRA's express preemption clause. Pet. App. 1a-2a (emphasis in original). Here again, Congress did not grant the EPA any authority to exempt state requirements from preemption.[9] Notably, Congress *has* granted other agencies exemption authority under other preemption schemes. See, *e.g.*, 15 U.S.C. § 1203(c) (granting Consumer Product Safety Commission ("CPSC") authority under certain circumstances to exempt state requirements from preemption under the Flammable Fabrics Act); *id.* § 1476(c) (same for CPSC under the Consumer Product Safety Act); 21 U.S.C. § 360k(b) (same for Food and Drug Administration under the Medical Device Amendments); 46 U.S.C. §§ 4305, 4306 (same for Coast Guard under the Boat Safety Act). See also 15 U.S.C. § 2617(b).[10]

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[9] In fact, Congress took pains to point out that the subsection immediately following Section 136v(b) – which authorizes States, in the absence of EPA disapproval, to register pesticides for "additional uses" in order "to meet special local needs" (15 U.S.C. § 136v(c)(1)) – was not "intended to derogate" the preemption clause or to grant EPA the power "to delegate to the States authority to set aside the preemption provisions of [subsection (a)]." H.R. Rep. No. 92-511, at 16 (1971). Thus, Congress made clear its intent to protect and preserve the preemptive force of FIFRA even against attempted encroachments by EPA.

[10] Notably, Congress in enacting FIFRA also elected not to include any provision that might have been interpreted as a "savings" clause sparing certain state requirements from preemption. Compare, *e.g.*, 49 U.S.C. § 30103(b), (e) (National Traffic and Motor Vehicle Safety Act) (discussed in *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000)).

Nor does other language in FIFRA's express preemption clause lend support to the notion that "without EPA regulation" on the same subject matter targeted by a state-law claim "there can be no preemption." Pet. App. 13a. Section 136v(b) preempts "*any* requirements for labeling or packaging" imposed by the States that are either "different from" or *"in addition to* * * * those required under this subchapter." 7 U.S.C. § 136v(b) (emphasis added). When EPA leaves some aspect or subject matter of a registered pesticide's labeling unregulated, state labeling requirements that target the aspect or subject matter plainly are "in addition to" the federal labeling requirements that *do* apply to the pesticide. See, *e.g.*, 40 C.F.R. § 156.10 (2001). See generally *Worm* v. *American Cyanamid Co.*, 970 F.2d 1301, 1308 (4th Cir. 1991) ("We * * * construe the prohibition against state labeling requirements 'in addition to' those in FIFRA to preempt the imposition of categories of labeling restrictions not provided by the federal law.").

Moreover, Congress knows full well how to specify that a federal requirement on the same subject matter must be in existence before state law is expressly preempted, and has done so in other preemption provisions (but not in FIFRA). For example, in the preemption provision of the National Traffic and Motor Vehicle Safety Act, Congress provided:

> *When a motor vehicle safety standard is in effect* under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard *applicable to the same aspect of performance* of a motor vehicle or motor vehicle equipment only if the standard is identical to *the standard prescribed under this chapter.*

49 U.S.C. § 30103(b) (emphasis added); see also 15 U.S.C. § 1203(a) (preempting state law "whenever a [federal] standard or other regulation * * * is in effect"); *id.* § 1476(a) (same). Or Congress can accomplish the same result by having no express preemption provision at all or repealing a preexisting preemption provision. See *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988)

("repeal of [Emergency Petroleum Allocation Act] regulation did not leave behind a pre-emptive grin without a statutory cat"). But FIFRA's preemption clause does *not* require that a federal requirement be in effect, and the clause has *not* been repealed. In fact, Congress has repeatedly amended FIFRA but has left unchanged the language of Section 136v(b), even after that provision was widely interpreted as preempting state requirements imposed through the common law (including in crop injury cases such as this).

The Texas Supreme Court had no authority – in conflict with the Fourth Circuit's decision in *Worm* – to rewrite FIFRA's broad preemption provision to have the same effect as a clause with radically different wording or a repealed clause.[11] For all of these reasons (as well as others discussed by American Cyanamid, see Pet. 16-21), the Texas Supreme Court was wrong to conclude that a state labeling requirement is not subject to preemption under Section 136v(b) unless and until the EPA has "regulate[d the] * * * product's labeling *on that subject*." Pet. App. 14a (emphasis added). The Texas Supreme Court's faulty reasoning makes this case particularly worthy of this Court's review.

In addition, if left uncorrected, the lower court's analysis could generate substantial litigation in Texas if not in other States. The reason is straightforward: whether a federal require-

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[11] Even if Section 136v(b) could be read as requiring that some federal labeling requirement be in existence before preemption is triggered, it would not support the Texas Supreme Court's apparent view that *the EPA* must regulate the labeling before preemption is triggered. Pet. App. 13a. By its plain terms, Section 136v(b) refers to any federal requirements that might be "required *under this subchapter*." 7 U.S.C. § 136v(b) (emphasis added). That, of course, includes requirements imposed directly on the labeling by FIFRA itself (without any regulatory action by the EPA). See, *e.g.*, *id.* §§ 136(q)(1)(F)-(G), 136j(a)(1)(E) (regulating pesticide labeling by requiring that pesticides not be misbranded).

ment regulates the same "subject matter" in pesticide labeling is obviously open to debate. Thus, it is foreseeable that litigants in Texas will attempt further to erode FIFRA's preemption clause by arguing – even in failure-to-warn cases involving personal injury rather than agricultural crop-damage claims – that there is no federal labeling requirement that in fact covers the same "subject matter." The Court should act now to prevent further evisceration of Congress's directive that pesticide labeling should be nationally uniform.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF[1]

This case squarely presents for the Court's review the important, frequently recurring question of whether FIFRA pre-empts farmers from bringing agricultural crop injury suits that challenge the content of EPA-approved product labeling – here, labeling which explicitly authorized use of the on-the-farm, pesticide "tank mix" combination that Respondents allege harmed their peanut crop. Earlier this week the Court denied review in *Netland v. Hess & Clark*, 284 F.3d. 895 (8th Cir. 2002), *cert. denied*, ___ U.S.L.W. ___ (Oct. 15, 2002), a personal injury case involving pesticide *misuse* in which the Eighth Circuit had reaffirmed the well settled principle – recognized by eight other federal circuits and numerous state appellate courts – that § 136v(b) of FIFRA expressly pre-empts labeling-related requirements imposed by state law damages claims. The Court's denial of review in *Netland*, while not surprising in view of the virtual unanimity among the lower courts on the question there presented, in no way detracts from the need for review of the quite different issue presented in this case. Only this Court can resolve the intolerable conflict created by the Texas Supreme Court's opinion below that labeling-related claims involving agricultural crop injury are exempt from pre-emption.

I. THE COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257

1. In every practical way the opinion below is a "final judgment" for purposes of 28 U.S.C. § 1257. "The

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[1] The Rule 29.6 corporate disclosure statement filed with the petition remains accurate.

federal issue" involved in this appeal – whether FIFRA pre-empts Respondents' agricultural crop injury claims – "has been finally decided" by the Texas Supreme Court. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482 (1975). The state supreme court unequivocally held that Respondents' "claims are not preempted" given that they involve agricultural crop injury, a subject supposedly unregulated by EPA or FIFRA. Pet. App. A at 2a. As a result, "[t]his case has been remanded by the state supreme court to the district court for trial on the merits." Opp. at 3.

If this Court grants the petition for certiorari and holds, contrary to the opinion below, that FIFRA pre-emption of labeling-related damages claims extends to suits involving agricultural crop injury, this litigation will be over. "[R]eversal of the state court on the federal issue would be preclusive of any further litigation" because the Texas Court of Appeals (like the state trial court) already has found, after considering the parties' arguments and evidence, that "*[a]ll* of plaintiffs' state law claims *relate directly or indirectly to the product label* stating that the herbicides may be combined by tank mixing." *Cox*, 420 U.S. at 482; Pet. App. B at 16a (emphasis added).[2]

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[2] The court of appeals treated the subject of whether Respondents' claims are labeling-related as a factual issue. It based its finding that all of the claims are labeling-related on "the summary judgment proof show[ing]" that "plaintiffs relied upon off-label magazine and brochure advertisements made by defendant [American Cyanamid] regarding Prowl and Pursuit;" that "[t]hese advertisements stated that 'PURSUIT can be tank mixed with other popular products such as PROWL herbicide;' " that "[t]he Pursuit labeling specifically stated that Pursuit and Prowl may be combined by tank mixing;" and hence, that "[t]he off-label statements merely repeated information on the labels." Pet. App. B at 15a-16a & 16a n.2.

Under the Texas Constitution, this factual finding by the state court of appeals "shall be conclusive," and therefore, cannot be reviewed by the Texas Supreme Court. Texas Const. Art. V, sec. 6(a) ("the decision of said courts [of appeals] shall be conclusive on all questions of fact brought before them on appeal or error") (App. at 1a); *see generally Leitch v. Hornsby*, 935 S.W.2d 114, 120 (Tex. 1996) (Abbott, J., concurring) ("This provision 'restrict[s], in express terms, the jurisdiction of the [Texas] supreme court, and . . . confine[s] it to questions of law.' ") (quoting *Choate v. San Antonio & A.P. Ry. Co.*, 44 S.W. 69, 69 (Tex. 1898)); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 40 & n.15 (Tex. 1994) (internal quotation omitted) (citing the "narrow type of review permitted this [Texas Supreme] Court by the Texas Constitution" and noting that the "[Texas] Supreme Court is not invested with the power to determine facts"); *Herbert v. Herbert*, 754 S.W.2d 141, 143 (Tex. 1988) (Article V, section 6 of the Texas Constitution "was designed to remove fact jurisdiction from the [Texas] supreme court"); W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 St. Mary's L.J. 1045, 1139 (1993) (Article V, section 6 "acts as a limitation on the judicial authority of the [Texas] supreme court and confines its jurisdiction to questions of law.").[3]

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[3] In an effort to distinguish this case from *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995) (holding that FIFRA pre-empts all common law claims relating directly or indirectly to labeling), Respondents attempted to argue in the Texas Supreme Court that "the court of appeals erred in holding that all of their claims related directly or indirectly to the product label." Opp. at 2. The opinion below, however, does not, and under Art. V, sec. 6(a) of the Texas Constitution could not, disturb the court of appeals' finding. Instead, the opinion below indicates that the "fundamental difference" between the two cases is that "*Quest* involved

(Footnote cont'd on next page.)

Thus, contrary to Respondents' assertion, if this Court were to grant review and reverse the opinion below, the Texas Supreme Court would *not* then "be called upon further to determine" which of their claims are labeling-related. Opp. at 4. There would be no Texas Supreme Court "decision on remand." *Id.* Instead, because the state court of appeals already has conclusively found that all of Respondents' claims are labeling-related, there would be nothing left for the Texas Supreme Court to do other than order dismissal of the case. Indeed, this is one of the reasons why this case is an excellent vehicle for the Court's review.[4]

2. Respondents also argue that *Cox* is inapplicable, and that the Court should refrain from exercising its § 1257 jurisdiction, because "the potentially serious erosion of federal policy – is totally absent" from this case. Opp. at 9. They denigrate to "relative insignificance" Congress' steadfast and unambiguous mandate, reflected in the text and title of § 136v(b) of FIFRA ("Uniformity"), and in its legislative history, that each pesticide product be accompanied by nationally uniform labeling whose content is regulated solely by EPA, and not by the States. *Id.* at 7; *see* Pet. at 14-15, 18 (discussing § 136v(b) and its legislative

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(Footnote cont'd from previous page.)

a claim for personal injury while this case involves a claim for target crop damage." Pet. App. A at 13a.

[4] Respondents concede that at least some of their claims are labeling-related. *See* Opp. at 1-2. Under *Cox*, that is enough to invoke the Court's § 1257 jurisdiction since "reversal of the state court on the federal [pre-emption] issue would be preclusive of any further litigation *on the relevant cause[s] of action*" (i.e., on any and all labeling-related causes of action). 420 U.S. at 482-83.

history); Brief of CropLife America as *Amicus Curiae* in Support of Petitioner at 1, 4, 14-15, 16 n.9 & n.10, 18-19.

The importance to industry, farmers, and the public of the national labeling uniformity mandated by § 136v(b) cannot be overstated. Uniformity of labeling is an integral part of the " 'coordinated Federal-State administrative system" that Congress established "to carry out [FIFRA's] program.' " *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 615 (1991) (quoting H.R. Rep. No. 92-511, at 1-2 (1971)). As this Court has recognized, "[l]abeling . . . fall[s] within an area that FIFRA's 'program' pre-empts." *Id.* Nationally uniform product labeling promotes the safe and effective usage of pesticides, and is essential for maintaining the integrity of EPA's determinations regarding the labeling of pesticides. *See New York Pesticide Coalition v. Jorling*, 874 F.2d 115, 119 (2d Cir. 1989) (internal quotation omitted) (§ 136v(b) "has as its main focus . . . preserving the force of the information contained in the FIFRA label").

There is no question that this case implicates important federal interests, and thus satisfies the requirement of *Cox's* fourth category that "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 483; *see* CropLife America *Amicus* Br. at 5 n.3 (explaining that under *Cox*, "[i]t is enough that important federal interests are *implicated*"). Indeed, as CropLife America discusses in its *amicus curiae* brief, this Court frequently has exercised jurisdiction under § 1257 to grant immediate review of state supreme court decisions (like the opinion below) which, if left undisturbed, have the potential to seriously erode federal policies – such as national uniformity – underlying federal pre-emption provisions. *See* CropLife America *Amicus* Br. at 4-8; *see also* Pet. at 21-22.

Respondents assert that the opinion below "will not impair" the federal policy of national labeling uniformity

because the regulatory effect of state damages awards against pesticide manufacturers for labeling-related claims is "mere supposition." Opp. at 7, 8. To the contrary, this Court repeatedly has held that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and *controlling policy*." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)) (emphasis added). Thus, Respondents' argument that

> the liable party is not "required" to change his label by a damage award . . . is sophistry. If plaintiffs could recover large damage awards because the herbicide was improperly labeled under state law, the undeniable practical effect would be that state law *requires* additional labeling standards not mandated by FIFRA.

MacDonald v. Monsanto Co., 27 F.3d 1021, 1025 (5th Cir. 1994).

II. THE OPINION BELOW CREATES AN IRRECONCILABLE SPLIT OF AUTHORITY ON AN IMPORTANT FEDERAL QUESTION THAT AFFECTS FARMERS, PESTICIDE MANUFACTURERS, AND THE PUBLIC

The overarching federal question presented by this appeal is whether FIFRA pre-empts failure-to-warn and other labeling-related state law damages claims involving agricultural crop injury. Conceding that "many jurisdictions . . . have reached the *opposite* result," the Texas Supreme Court categorically held that such claims are not pre-empted. Pet. App. A at 12a (emphasis added). Indeed, the California Supreme Court reached *exactly* the opposite result in

Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366 (Cal. 2000). And the U.S. Court of Appeals for the Fifth Circuit (consistent with four other federal circuits) reached *exactly* the opposite result in *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999). *See* Pet. at 9-12.

Respondents assert, however, that "the decision below does not present a conflict." Opp. at 9. In a futile effort to support this erroneous contention, they argue that "the Texas Supreme Court's opinion addressed an issue of first impression." Opp. at 11. To the contrary, the Texas Supreme Court addressed the *same* question as the California Supreme Court and the Fifth Circuit. That question is whether FIFRA pre-empts labeling-related damages claims alleging agricultural crop injury due to the toxic effects of pesticides ("phytotoxicity"). Yet, the Texas Supreme Court reached a *diametrically conflicting* legal conclusion on this question.

Even if, as Respondents assert, the opinion below relies upon an "essential distinction" (the supposed distinction between "phytotoxicity" and "target area phytotoxicity") which *Etcheverry*, *Andrus*, and other cases overlook, that would *not* make this a case of "first impression" that "cannot be in conflict with *Etcheverry, Andrus*, or the prior decision of any other Court." *Id.* at 11 (quoting Pet. App. at 12a). Instead, the Texas Supreme Court's conflicting FIFRA pre-emption analysis and conclusion only underscore the split of authority and the need for this Court's immediate review to resolve the conflict.

Moreover, the conflict created by the Texas Supreme Court's opinion transcends labeling-related crop injury claims alleging phytotoxicity. The opinion below also authorizes Texas farmers to file labeling-related state court damages suits that allege crop injury due to the ineffectiveness (i.e., lack of efficacy) of FIFRA-registered

pesticide products in controlling weeds, insects, or other types of pests. It also raises the prospect of personal injury suits involving alleged risks for which EPA may not impose labeling requirements at the time of initial product registration. *See* Pet. at 22; CropLife America *Amicus* Br. at 18-19.

The arguments in Respondents' opposition as to why the Texas Supreme Court's opinion is "correct" – in other words, why *Etcheverry*, *Andrus*, and other crop injury cases supposedly are wrong – only highlight the conflict and need for this Court's review. Opp. at 12. For example, in an attempt to defend the opinion below on the merits, Respondents' opposition argues that "[t]he extent of the EPA's exercise of its discretionary authority [to require manufacturers to submit efficacy data if problems develop after a pesticide is registered] is overstated by the *Etcheverry* court." *Id.* at 13-14. EPA's post-registration regulation of labeling to prevent crop damage (due to either phytotoxicity or lack of efficacy) is a point which the California Supreme Court emphasized in *Etcheverry*, but which the Texas Supreme Court's opinion completely ignores. *Compare Etcheverry*, 993 P.2d at 375-76 ("The EPA's postregistration consideration of efficacy") *with* Pet. App. at 2a ("the EPA does not regulate herbicide labels regarding how well a product works").

Respondents also argue, consistent with the opinion below – but contrary to *Etcheverry*, *Andrus*, and other cases – that there can be no pre-emption under § 136v(b) without an EPA regulation imposing specific labeling requirements on a particular subject (e.g., efficacy, phytotoxicity); that the "efficacy data waiver" is a statutory exception to § 136v(b);

and that EPA's determination not to normally require submission of efficacy data at the time an agricultural pesticide is first registered negates the pre-emptive effect of § 136v(b). Opp. at 12-14.[5] These too are key points in dispute between the Texas and California supreme courts, and between the Texas Supreme Court and the Fifth Circuit, which only this Court can resolve.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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[5] Respondents, like the Texas Supreme Court, are adamant that there is no express pre-emption under § 136v(b), but fail to consider implied conflict pre-emption. *See* Pet. at 22 n.8.

APPENDIX

APPENDIX

THE TEXAS CONSTITUTION

Article 5 – JUDICIAL DEPARTMENT

Section 6 – COURTS OF APPEALS

(a) The state shall be divided into courts of appeals districts, . . . Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

* * *

(c) All constitutional and statutory references to the Courts of Civil Appeals shall be construed to mean the Courts of Appeals. (Amended Aug. 11, 1891, Nov. 7, 1978, Nov. 4, 1980, Nov. 5, 1985, and Nov. 6, 2001).

No. 02-367

In The

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,

Petitioner,

v.

TERRY GEYE and BRANDON GEYE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' SUPPLEMENTAL BRIEF PURSUANT TO RULE 15.8

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RESPONDENTS' SUPPLEMENTAL BRIEF PURSUANT TO RULE 15.8

The purpose of this Supplemental Brief is to address a point of Texas law first raised by Petitioner American Cyanamid Company ("Cyanamid") in its Reply Brief. That point warrants correction and, indeed, must be brought to this Court's attention because it concerns this Court's jurisdiction to hear this case.

Cyanamid asserts that "[t]he court of appeals treated the subject of whether Respondents' claims are labeling-related as a factual issue," *Reply* at 2 n. 2, and that "[u]nder the Texas Constitution, this factual finding by the state court of appeals 'shall be conclusive,' and therefore, cannot be reviewed by the Texas Supreme Court." *Id.* at 3 (quoting TEX. CONST., art. V, §6(a)). Cyanamid has misconstrued the record and the law. When Cyanamid's assertions are corrected, it is clear that this Court does not have jurisdiction under the fourth exception to judgment finality set forth in *Cox Broadcasting v. Cohn,* 420 U.S. 469, 482 (1975).

Whether any of Respondents' claims are labeling-related is a question of law and was treated as such by the court of appeals. The Texas Constitution's provision "that the decision of [the courts of appeals] shall be conclusive on all matters of fact," TEX. CONST., art. V, §6(a), pertains to situations in which the issue on appeal involves a challenge to the factual sufficiency of the evidence. *See Cropper v. Caterpillar Tractor Co.,* 754 S.W.2d 646, 648-49 (Tex. 1988) (construing TEX. CONST., art. V, §6 (1891, amended 2001), and discussing the historical basis for the Texas appellate courts' "power to review jury verdicts on factual issues"). Indeed, each of the Texas cases cited by Cyanamid, *Reply* at

3, was an appeal from a jury trial. *See e.g. Herbert v. Herbert,* 754 S.W.2d 141, 142 (Tex. 1988).

This case proceeded to the court of appeals after the trial court granted Cyanamid's motion for summary judgment. "The very principle upon which summary judgments are founded is that the record presents no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *City of Grand Prairie v. City of Irving,* 441 S.W.2d 270, 273 (Tex.Civ.App.–Dallas 1969, no writ) (citation omitted); *see Kellum v. Pacific Nat'l Fire Ins. Co.,* 360 S.W.2d 538, 540 (Tex.Civ.App.–Dallas 1962, writ ref'd, n.r.e.) ("This is a summary judgment action wherein no facts are decided"). Therefore, when reviewing a trial court's summary judgment, the duty of the court of appeals "is not to decide any issues of fact." *Gevinson Associates v. Ling Elec., Inc.,* 373 S.W.2d 564, 566 (Tex.Civ.App.–Dallas 1963, no writ); *accord Garcia v. Garcia de Ortiz,* 257 S.W.2d 804, 807 (Tex.Civ.App.–San Antonio 1953, no writ). The performance of that duty is not optional, because the court of appeals "has no jurisdiction to determine originally questions of fact in cases brought there on appeal." *Wisdom v. Smith,* 209 S.W.2d 164, 166 (Tex. 1948). If, as Cyanamid maintains, the court of appeals in the present case made a "factual finding," *Reply* at 3, it would mark the first time in the history of Texas jurisprudence that an appellate court has undertaken to so act. "No appeals court in Texas has ever been given, or has ever exercised, the authority to *find* any fact." *Herbert,* 754 S.W.2d at 145 (Phillips, C.J., concurring) (emphasis in original).

The purely legal question of whether Respondents' claims are labeling-related was presented to the Texas Supreme Court, *Reply* at 3 n. 3, but the court did not reach that issue which was mooted by the court's decision based on its

interpretation of the breadth of the congressionally created exception to FIFRA preemption. Consequently, reversal of the Texas Supreme Court on the federal issue of the scope of the FIFRA preemption exception would not be preclusive of further litigation on the separate federal issue of whether any of Respondents' claims (e.g., breach of express warranty) are labeling-related. *See Cox,* 420 U.S. at 482.

For this reason, as well as those in Respondents' opposition, the petition for a writ of certiorari should be denied.

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No. 02-367

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT (AMENDED)

As previously indicated, Petitioner American Cyanamid Company is a wholly owned subsidiary of Wyeth, and no other company owns 10% or more of Petitioner's stock. Petitioner wishes to note that in July 2000 its assets were sold by American Home Products Corporation (now known as Wyeth) to BASF Aktiengesellschaft.

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Sup. Ct. R. 15.8, Petitioner American Cyanamid Company hereby submits this Supplemental Brief in further support of the petition for a writ of certiorari.

1. A recent FIFRA pre-emption opinion rendered by a Minnesota federal district court in a labeling-related agricultural crop injury case, *Dahlman Farms, Inc. v. FMC Corp.*, Civ. No. 01-986, 2002 WL 31750005 (D. Minn. Dec. 2, 2002), rejects the Texas Supreme Court's opinion in *Geye*, and thereby deepens the conflict created by the opinion below and underscores the need for this Court's review.

The plaintiff, Dahlman Farms, Inc., filed a Minnesota state court suit alleging that AIM, a FIFRA-registered herbicide, caused phytotoxic injury to its 1999 seed corn crop. The herbicide's EPA-approved labeling "stated that AIM could be used on seed corn and that such use would not result in a loss of yield." 2002 WL 31750005, at *2. Based on this label representation, and also on advertising and other "off-label" representations to the same effect, Dahlman brought Minnesota state law causes of action against the herbicide manufacturer for negligent testing, negligent labeling, strict liability, breach of express warranty, breach of implied warranty, and false advertising and consumer fraud. Following removal, the manufacturer moved for summary judgment on the ground that all of Dahlman's claims are labeling-related, and therefore, expressly pre-empted by § 136v(b) of FIFRA. The district court agreed and granted summary judgment.

Relying in part on *Geye*, "Dahlman argue[d] that the FIFRA's preemptive scope does not extend to claims based on the inadequacy of statements relating to pesticide efficacy – that is, statements regarding whether the pesticide actually works and whether it will harm the target crop it is supposed to protect – because such statements are not required under the FIFRA." *Id.* at *3; *see also id.* at * 4 (Dahlman "relie[d]

on . . . the recent decision of the Texas Supreme Court in [*Geye*], which held that the FIFRA does not preempt common law claims arising from crop damage because the EPA does not regulate pesticide efficacy").

The Minnesota federal district court, however, sharply criticized *Geye*'s holding:

> Dahlman's position that claims premised on the inadequacy of voluntary statements related to pesticide efficacy are not preempted is **not supported by the language or purpose of the FIFRA's preemption clause**. Again, section 136v(b) prohibits states from imposing or continuing in effect "any requirements for labeling or packaging *in addition to or different from* those required under [the FIFRA]." (Emphasis added.) As the italicized language demonstrates, **the scope of the provision is *not* limited to state requirements that overlap federal requirements**. The Texas Supreme Court in *Geye* adopted a different interpretation of section 136v(b), stating that "Congress has dictated that state actions regarding product labeling are preempted *to the extent that the content of the product label is regulated*." *Geye*, 79 S.W.2d at 22 (emphasis added); *see also id.* at 29 (stating "without EPA regulation, there can be no preemption"); *id.* (stating "the scope of FIFRA's preemption is dependent on what the EPA regulates"). **The Court respectfully disagrees with *Geye* on this point.** If the federal government's labeling requirements are limited to pesticide characteristics A, B, and C, and a state imposes a labeling requirement related to pesticide characteristic D, **the conclusion that the state requirement is both "in addition to" and "different from" the federal**

> **requirements seems inescapable. Furthermore, allowing states to impose such requirements could result in 50 different sets of requirements, each one potentially conflicting with some or all of the others, thereby frustrating the FIFRA's objective of establishing a uniform system of pesticide labeling requirements.**
>
> . . . the Eighth Circuit has never indicated that FIFRA preemption analysis depends on whether the allegedly inadequate statement was voluntarily undertaken or required by the EPA. . . . the Court concludes that breach of express warranty claims are preempted by the FIFRA if based on alleged misstatements made on an EPA-approved pesticide label, **without regard to whether the alleged misstatement is one required by the EPA.**

Id. at *4-*5 (italics in original) (emphasis added). The *Dahlman Farms* opinion, therefore, is squarely at odds with *Geye* and further supports the need for review and reversal of the Texas Supreme Court's opinion.

2. Another recent FIFRA pre-emption case, *Lowe's Home Centers, Inc. v. Olin Corp.*, No. 02-10518, 2002 WL 31730843 (11th Cir. Dec. 6, 2002), also holds, again contrary to *Geye*, that FIFRA pre-emption of labeling-related claims, including in connection with property damage, is not limited to statements that EPA requires to be placed upon a product's nationally uniform labeling.

The plaintiff, Lowe's, alleged that fire destroyed one of its retail stores because Olin, the manufacturer of a FIFRA-registered swimming pool chlorinating pesticide, failed to provide proper warnings regarding the combustion-related dangers of storing and handling the product. More specifically, Lowe's alleged that its

property suffered damage because Olin allegedly had failed to disclose certain hazard information in written storage and handling "Guidelines" – a document which the court of appeals indicated was "*not required by FIFRA* nor approved by the EPA." 2002 WL 31730843, at *6 (emphasis added).

Relying upon its landmark express pre-emption opinion in "*Papas II*," which found that "the term 'requirements' [in § 136v(b) of FIFRA] was sufficiently broad so as to cover jury damages awards and that challenges to warnings on materials other than the label of a product necessarily implies that the warning itself was inadequate," the court of appeals held that Lowe's claims are pre-empted. *Id.* (citing *Papas v. Upjohn Co.* ("*Papas II*"), 985 F.2d 516 (11th Cir. 1992), *cert. denied*, 510 U.S. 913 (1993)). In reaching this conclusion, the court also discussed its earlier, implied FIFRA pre-emption opinion in "*Papas I*," in which "the court noted that common law tort suits for inadequate labeling would hinder Congress' objectives, including uniform labeling across the nation." *Id.* at *4 (citing *Papas v. Upjohn Co.* ("*Papas I* "), 926 F.2d 1019 (11th Cir. 1992), *vacated and remanded sub nom. Papas v. Zoecon Corp.*, 505 U.S. 1215 (vacating and remanding for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)).

3. The Court's recent opinion in *Sprietsma v. Mercury Marine*, 123 S.Ct. 518 (2002), has no effect on FIFRA pre-emption of labeling related damages claims, including in agricultural crop injury suits.

The Court held in *Sprietsma* that the Federal Boat Safety Act ("FBSA") does not expressly or impliedly pre-empt a state common-law tort action seeking damages from the manufacturer of an outboard motor that allegedly caused a fatal injury because it was not equipped with a propeller

guard. To "encourag[e] uniformity of boating laws *insofar as practicable* [the FBSA] authorizes the Secretary of Transportation [Coast Guard] to issue regulations establishing '*minimum* safety standards for recreational vessels and associated equipment,' and requiring the installation or use of such equipment." 123 S.Ct. at 523 (citing 46 U.S.C. § 4302) (emphasis added). The FBSA contains an "express pre-emption clause [which] applies to 'a [state or local] law or regulation' " that is "not identical to a regulation prescribed under [the statute]." *Id.* at 524, 526 (quoting 46 U.S.C. § 4306). The FBSA also contains a "saving clause" which "states that '[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.' " *Id.* at 526 (quoting 46 U.S.C. § 4311(g)).

(a) After carefully analyzing the particular language that Congress chose to utilize in the FBSA's pre-emption clause, the Court held that the statute does not expressly pre-empt the plaintiff's claims:

> Here, the express pre-emption clause in § 10 applies to "a [state or local] law or regulation." 46 U.S.C. § 4306. We think that this language is most naturally read as not encompassing common-law claims for two reasons. First, the article "a" before "law or regulation" implies a discreteness – which is embodied in statutes and regulations – that is not present in the common law. Second, because "a word is known by the company it keeps" [citation omitted], the terms "law" and "regulation" used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If "law" were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express

> reference to "regulation" in the pre-emption clause superfluous.

Id. at 526.

Unlike the FBSA, § 136v(b) of FIFRA bars any state-imposed (labeling) "*requirements*," a term which the Court in *Cipollone v. Liggett Group* described as "*much broader*" than the term "regulation." 505 U.S. 504, 520 (1992) (emphasis added). (The Court was comparing the 1969 federal cigarette act's pre-emption provision with its 1965 predecessor.) "Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies . . . the term 'regulation' most naturally refers to positive enactments by those bodies, not to common-law damages actions." *Id.* at 519. In contrast, the Court explained that the term "requirement[s] . . . *sweeps broadly* and suggests *no distinction* between positive enactments and common law." *Id.* at 521 (emphasis added).

Moreover, unlike the FBSA's regulation of boat safety, FIFRA's regulation of labeling does not merely "encourag[e] uniformity . . . insofar as practicable," or establish "minimum" standards which the States are free to supplement. Instead, Congress intended § 136v(b) "to *completely preempt* State authority in regard to labeling." H.R. Rep. No. 92-511, at 16 (1971) (emphasis added); *see Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 615 (1991) (labeling falls within an area that "FIFRA's 'program' pre-empts").

Furthermore, the Court found in *Sprietsma* that the FBSA's

> saving clause buttresses this [no express pre-emption] conclusion . . . the "saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption

> provision permits a narrow reading that excludes common-law actions."

123 S.Ct. at 526 (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868 (2000)). Unlike the FBSA, however, FIFRA contains no saving clause for common law liability.

(b) The Court in *Sprietsma* also rejected the manufacturer's contention that the FBSA impliedly pre-empts the plaintiff's common-law claims because the Coast Guard decided not to require propeller guards. Quoting from *Geier*, 529 U.S. at 869, the Court reaffirmed that "Congress' inclusion of an express pre-emption clause 'does *not* bar the ordinary working of conflict pre-emption principles,' " but was not "persuaded . . . that the FBSA has any such pre-emptive effect." 123 S.Ct. at 527 (emphasis in original).

More specifically, the Court indicated that

> [w]ith regard to policies defined by Congress, we have recognized that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."

Id. at 528 (quoting *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)) (emphasis in original). The Court found, however, that although the Coast Guard chose to forgo adopting a propeller guard regulation, it "did not take the further step of deciding that, as a matter of policy, the States . . . should not impose some version of propeller guard regulation." *Id.* Further, the Court found that the Coast Guard's decision not to adopt a propeller guard regulation "presents a sharp contrast" to the situation in *Geier* (involving DOT's policy on installation of automobile driver's side airbags), where "Congress has delegated to DOT authority to implement the statute; the

subject matter is technical; and the relevant history and background are complex and extensive." *Id.* at 528, 529 (quoting *Geier*, 529 U.S. at 883).

Insofar as EPA, through its efficacy data waiver policy, has decided to forgo imposing *labeling* requirements for the purpose of preventing crop injury due to target area phytotoxicity, that necessarily is equivalent to a decision to leave that complex, technical subject "*un*regulated" on pesticide labeling, since § 136v(b) indisputably bars the States from imposing their own requirements for pesticide labeling. Thus, EPA's policy presents a sharp contrast with the situation in *Sprietsma*, where the Court found that the Coast Guard's propeller guard policy was not equivalent to a decision to leave that subject unregulated. Unlike the Coast Guard's propeller guard policy, EPA's efficacy data waiver policy falls squarely within *Arkansas Electric*, and has "as much pre-emptive force as a decision *to* regulate." *Arkansas Electric*, 461 U.S. at 384.

(c) The Court found in *Sprietsma* that "the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies." 123 S.Ct. at 529. "The FBSA might be interpreted as expressly occupying the field with respect to state positive laws and regulations but its structure and framework do not convey a 'clear and manifest' intent . . . to go even further and implicitly pre-empt *all state common law* relating to boat manufacture." *Id.* at 530 (emphasis added).

In *Wisconsin Public Intervenor v. Mortier*, the Court found that FIFRA does not occupy "the field of pesticide regulation," but acknowledged that "labeling" does "fall within an area that FIFRA's [federal/state/local] 'program' pre-empts." 501 U.S. at 612, 615. This underscores an important distinction between the Court's analysis in *Sprietsma* and FIFRA pre-emption of *labeling-related* damages claims. Petitioner does not contend, and the case

law does not hold, that FIFRA pre-empts damages claims that are *un*related to labeling, much less *all* damages claims. *See, e.g., Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 398 (5th Cir. 1999) (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994)) (explaining that § 136v(b) "does not preempt common law that is unconcerned with herbicide labeling"). But "[w]hen a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA." *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366, 377 (Cal. 2000).

4. Subsequent to the filing of Petitioner's reply brief, Respondents submitted a supplemental brief arguing that the opinion below is not "final" for purposes of § 1257 jurisdiction because the Texas Court of Appeals would have had no original jurisdiction to make a factual finding regarding the labeling-related nature of their claims. The short answer to Respondents' contention is that in the state court of appeals, they contested, but the court of appeals exercised its appellate jurisdiction to affirm, the trial court's finding that all of their claims relate directly or indirectly to the labeling. As discussed in Petitioner's reply brief, the court of appeals, after reviewing the "summary judgment proof," treated the subject as a factual matter. *See* Reply Br. at 2 n.2. Under the Texas Constitution the court of appeals' decision to affirm the trial court's finding that the claims are labeling-related is conclusive and cannot be reviewed by the Texas Supreme Court. *See id.* at 3-4. In any event, Respondents concede that at least some of their claims are labeling-related. *See id.* at 4 n.4. The Texas Supreme Court's opinion is a final judgment within the meaning of § 1257, and this Court has jurisdiction.

For the foregoing reasons, and those presented previously, the petition for a writ of certiorari should be granted.

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PETITIONER'S SECOND SUPPLEMENTAL BRIEF

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PETITIONER'S SECOND SUPPLEMENTAL BRIEF[1]

Pursuant to Sup. Ct. R. 15.8, Petitioner American Cyanamid Company hereby submits this Second Supplemental Brief in further support of its petition for a writ of certiorari. The purpose of this supplemental brief is to respond to Public Citizen Litigation Group's assertion in *Eyl v. Ciba-Geigy Corp., petition for cert. filed*, 71 U.S.L.W. 3668 (U.S. Apr. 10, 2003) (No. 02-1500), that *Eyl* is a better vehicle for review than the instant appeal, *American Cyanamid Company v. Geye.*

As Cyanamid has previously explained, *all nine* federal circuits that have considered FIFRA pre-emption in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), have held that § 136v(b) expressly pre-empts state law failure-to-warn and other labeling-related damages claims against pesticide manufacturers. *See Geye* pet. at 10 n.2 (collecting cases); *see also Eyl v. Ciba-Geigy*, 650 N.W.2d 744, 751 (Neb. 2002) ("After the decision in *Cipollone* . . . every federal court of appeals to address the issue has held that common-law labeling-based failure-to-warn claims brought against manufacturers of pesticides or herbicides are preempted by FIFRA.") (collecting cases). Further, with one exception, there is unanimity among state supreme courts (including the Texas Supreme Court) on this fundamental principle. *See, e.g., Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366 (Cal. 2000); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *see also Geye* pet. at 12 (collecting additional cases but noting the aberrant holding in *Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042

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[1] The amended Rule 29.6 corporate disclosure statement filed with Petitioner's Supplemental Brief remains accurate.

(Mont. 2000), *cert. denied*, 122 S. Ct. 40 (2001)); *Eyl*, 650 N.W.2d at 751 ("numerous state appellate courts hold that FIFRA preempts labeling-based common-law causes of action") (collecting cases). Thus, "[t]he overwhelming majority of jurisdictions hold that FIFRA preempts state common-law failure-to-warn claims." *Eyl*, 650 N.W.2d at 754 (declining to overturn prior FIFRA pre-emption precedent).

The quite different question presented here is whether there is a gaping *exclusion* from FIFRA pre-emption for failure-to-warn claims involving subjects – such as prevention of agricultural crop damage – which EPA normally does not review when it initially approves a pesticide product's labeling. As Cyanamid's petition and the subsequent briefs filed in support of the petition discuss, the supreme courts of the nation's two largest agricultural states, Texas and California, are irreconcilably split on this important issue. So are the Texas Supreme Court and the U.S. Court of Appeals for the Fifth Circuit. *See Geye* pet. at 8-14; CropLife America *Amicus* Br. at 8-13; Petitioner's Reply Br. at 6-9.

After Cyanamid's petition was filed, the Court denied the petition filed by Public Citizen on behalf of a personal injury plaintiff in *Netland v. Hess & Clark*, 284 F.3d 895 (8th Cir.), *cert. denied*, 123 S. Ct. 415 (2002). The *Netland* petition had requested the Court to review the Eighth Circuit's refusal to overturn its previous opinions holding that § 136v(b) of FIFRA expressly pre-empts pesticide labeling-related requirements imposed by state law failure-to-warn claims. Now, in its virtually identical petition in *Eyl*, another personal injury case, Public Citizen again has proffered its theories against FIFRA pre-emption – theories which Public Citizen has repeatedly advocated and federal and state appellate courts have repeatedly rejected. *See, e.g., Lescs v. William R. Hughes, Inc.*, 168 F.3d 482 (4th Cir.

1999) (Table), unpub. op. avail. at No. 97-2278, 1999 WL 12913, *cert. denied*, 528 U.S. 1119 (2000); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366 (Cal. 2000); *Jenkins v. Amchem Prods., Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995); *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671 (Ga. 1994); *see also Netland, supra*; *Schuver v. E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610 (Iowa), *cert. denied*, 519 U.S. 910 (1996).

As it did in *Netland*, Public Citizen in *Eyl* again is urging the Court to review, despite the near unanimity among the lower courts, the well established principle that FIFRA expressly pre-empts failure-to-warn and other labeling-related damages claims. There is no more reason for the Court to grant review in *Eyl* than there was in *Netland*.[2]

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[2] The *Eyl* petition asserts that the plaintiff there did not assist in the application of the pesticide. *See Eyl* pet. at 8, 13. But that fact is immaterial to pre-emption: The overwhelming majority of FIFRA pre-emption cases do not distinguish between claims against pesticide manufacturers brought by pesticide applicators or users and those brought by so-called bystanders. *See, e.g., Lescs v. William R. Hughes, Inc., supra* (claim by homeowner whose residence was treated with a pesticide); *Cuevas v. E.I. Du Pont de Nemours & Co.*, 956 F. Supp. 1306 (S.D. Miss. 1997) (claim by truck driver who alleged that he was accidentally sprayed by a pesticide being applied to the roadside); *Traube v. Freund*, 775 N.E.2d 212 (Ill. App. Ct. 2002) (claim by pond owner who alleged that his trophy-grade bluegill fish were killed by runoff from a pesticide applied to neighboring farmland); *Ackles v. Luttrell*, 561 N.W.2d 573 (Neb.), *cert. denied*, 118 U.S. 329 (1997) (claim by mail carrier who alleged that he was exposed to a pesticide being sprayed on an adjacent cornfield); *June v. Laris*, 618 N.Y.S.2d 138 (N.Y. App. Div. 1994) (claim by fire fighter who alleged that he was accidentally exposed

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The *Eyl* petition acknowledges that "[t]he appellate courts are . . . divided on . . . whether FIFRA preempts a pesticide user's state-law failure-to-warn claim that a pesticide was not effective for its intended use, *e.g.*, a farmer's claim that a FIFRA-registered pesticide's ineffectiveness resulted in crop damage." *Eyl* pet. at 19. According to the *Eyl* petition, however, "[a] grant of certiorari here [in *Eyl*] would, if ultimately decided in petitioner Eyl's favor, necessarily resolve the conflict in the crop-damage cases." *Id.* at 19-20.

But if the Court were to grant review in *Eyl* and then affirm the Nebraska Supreme Court's unsurprising reconfirmation of the principle that FIFRA pre-empts failure-to-warn claims, that would leave *completely unresolved* the question presented here – whether there is an exception to that principle for failure-to-warn claims involving agricultural crop damage or other subjects which EPA does not normally review at the time it initially approves a pesticide product's labeling.

The *Eyl* petition nevertheless asserts in a footnote that it is "a better vehicle" for review than *Geye* because it "provides a basis for deciding the broader, more important,

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(Footnote cont'd from previous page.)

to a pesticide that was being applied on a farm); *Eriksen v. Mobay Corp.*, 41 P.3d 488 (Wash. Ct. App. 2002) (claim by farmer who alleged that he suffered personal injuries caused by aerial drift from a pesticide application on a neighboring farm); *Hue v. Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995) (claim by landowners who alleged that agricultural pesticides drifted onto their homes and farms damaging their plants and crops).

question whether FIFRA expressly preempts *any* failure-to-warn claims, not just those based on product efficacy." *Eyl* pet. at 20 n.7. But as discussed above, there is virtually no conflict among the lower courts on that "broader question." Further, the basic principle that FIFRA pre-empts failure-to-warn and other labeling-related damages claims necessarily is implicated by the more focused, "exception to pre-emption" issue presented here, where there indisputably is a deep and intolerable split of authority.

Public Citizen's assertions that review in *Eyl* also is warranted in light of the arguments against FIFRA pre-emption contained in a March 1999 *amicus curiae* brief filed on behalf of EPA in *Etcheverry v. Tri-Ag Serv., Inc.* are misplaced. Those arguments were repudiated by the California Supreme Court. *See* 993 P.2d at 371-77. Moreover, they have had no impact on the vast majority of other courts when invoked by plaintiffs in subsequent cases. *See, e.g., Eyl*, 650 N.W.2d at 753-54 ("we give no deference to the EPA's position in the amicus brief filed in Etcheverry . . . the California Supreme Court did not adopt the EPA's arguments"); *Netland*, 284 F.3d at 899 (rejecting plaintiff's request, based on EPA *Etcheverry amicus* brief, to overturn prior FIFRA pre-emption precedent); *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1207 (9th Cir. 2002) ("The California Supreme Court found the EPA's position in the main both unsupported by the relevant law and unpersuasive in its substance, noting that the EPA's views went against the holdings of [nine] federal circuit courts of appeal.").

Most recently, in *Anderson v. Dow AgroSciences LLC*, No. CIV-01-1939-HE (W.D. Okla. May 14, 2003), farmers alleged that a herbicide caused phytotoxic injury to their peanut crops. Slip op. at 2. Deepening the split of authority created by *Geye*, an Oklahoma district court held that "given the scope of the FIFRA preemption as interpreted by the Tenth Circuit . . . and most other courts," *Geye*'s

"distinction" (i.e., exemption for failure-to-warn claims involving subjects that "the EPA did not actually evaluate") is "not dispositive here." *Id.* at 8 n.12. More specifically, the court found that the plaintiffs' "claims of negligence, breach of express and implied warranties, deceptive trade practices, fraud and negligent representation can essentially be characterized as failure to warn claims *subject to preemption under FIFRA.*" *Id.* at 11 (emphasis added). As to the plaintiffs' reliance on the EPA *amicus* brief in *Etcheverry*, the court noted that the California Supreme Court "reject[ed] the EPA's argument." *Id.* at 8 n.13.

Significantly, in *American Cyanamid Company v. Geye*, this Court for the first time has invited the Solicitor General to express the views of the United States on the subject of FIFRA tort pre-emption. That in itself is a compelling reason why Cyanamid's petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 02-367

In the Supreme Court of the United States

AMERICAN CYANAMID COMPANY, PETITIONER

v.

TERRY GEYE AND BRANDON GEYE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, preempts respondents' state-law damages claims alleging that application of petitioner's herbicide products damaged respondents' peanut crop.

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In the Supreme Court of the United States

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AMERICAN CYANAMID COMPANY, PETITIONER

v.

TERRY GEYE AND BRANDON GEYE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondents Terry and Brandon Geye sued petitioner American Cyanamid Company in the District Court of Eastland County, Texas, alleging that their application of petitioner's herbicide products damaged their peanut crop. The district court granted petitioner summary judgment, ruling that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, preempted respondents' claims for relief. Pet. App. 25a-26a. The Eleventh Court of Appeals of Texas reversed that judgment and remanded the case for trial. *Id.* at 15a-24a. The Texas Supreme Court affirmed the court of appeals' judgment. *Id.* at 1a-14a.

1. *The Federal Insecticide, Fungicide, and Rodenticide Act.* Congress created FIFRA through a series of

enactments to regulate the labeling, sale, and use of pesticides. See *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 601 (1991). As originally enacted in 1947, see ch. 125, 61 Stat. 163, FIFRA "was primarily a licensing and labeling statute." *Wisconsin*, 501 U.S. at 601 (quoting *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 991 (1984)). In 1972, Congress "significantly strengthened FIFRA's registration and labeling standards" in response to "environmental and safety concerns." *Ibid.* See Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-515, 86 Stat. 973 (1972 Amendments). In addition, Congress "regulated the use, as well as the sale and labeling, of pesticides" and granted the Environmental Protection Agency (EPA), which had previously been charged with federal oversight of pesticide programs, "increased enforcement authority." *Ibid.* The 1972 Amendments effectively "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ibid.* (quoting *Ruckelshaus*, 467 U.S. at 991). Congress has continued to amend FIFRA in response to experience gained in regulating pesticides. See, *e.g.*, Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (1978 Amendments).

a. FIFRA's regulatory framework is centered on the requirement that pesticide producers must obtain an EPA registration for a pesticide before the pesticide may be sold or distributed in the United States. 7 U.S.C. 136a. FIFRA provides that EPA "shall register a pesticide" if the agency determines, in light of any restrictions placed on the pesticide's use:

> (A) its composition is such as to warrant the proposed claims for it;

> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. 136a(c)(5). EPA has promulgated regulations detailing the registration requirements. See 40 C.F.R. 152 *et seq.*

Based on its experience following the 1972 Amendments, EPA reported to Congress that the agency's obligation to evaluate efficacy claims in the registration process was diverting scarce resources needed to evaluate environmental and health effects. Congress responded in the 1978 Amendments, providing:

> In considering an application for the registration of a pesticide, the Administrator [of EPA] may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy.

7 U.S.C. 136a(c)(5). As a consequence of the 1978 Amendments, EPA's regulations governing registration of pesticides now state:

> The Agency has waived all requirements to submit efficacy data unless the pesticide product bears a claim to control pest microorganisms that pose a threat to human health and whose presence cannot

> readily be observed by the user including, but not limited to, microorganisms infectious to man in any area of the inanimate environment or a claim to control vertebrates (such as rodents, birds, bats, canids, and skunks) that may directly or indirectly transmit diseases to humans. However, each registrant must ensure through testing that his products are efficacious when used in accordance with label directions and commonly accepted pest control practices. The Agency reserves the right to require, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration.

40 C.F.R. 158.640(b)(1); see 40 C.F.R. 158.540; 47 Fed. Reg. 53,192 (1982); 44 Fed. Reg. 27,932, 27,938 (1979) (col. 3). Additionally, after a pesticide has been registered, EPA requires the registrant to report certain incidents of known harm to non-target organisms, such as crops. 40 C.F.R. 159.184(a)(1)-(3).

b. FIFRA establishes a program for federal-state cooperation in regulating pesticides. See *Wisconsin*, 501 U.S. at 601-602. Section 136v, captioned "Authority of States," set out key principles of that relationship. See 7 U.S.C. 136v. Section 136v(a) recognizes that, as a general matter, States retain their historic authority to regulate pesticide sale or use, provided that a State does not permit a sale or use that FIFRA, or EPA's implementing regulations, prohibit:

> **(a) In general**
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

7 U.S.C. 136v(a). Nevertheless, to ensure a uniform nationwide approach to pesticide labeling, Section 136v(b) provides a specific limitation on a State's authority with respect to the content of pesticide labeling:

> **(b) Uniformity**
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. 136v(b). Section 136v(c)(1) further provides that a State shall have the power, subject to various limitations, to allow additional uses of federally registered pesticides within the individual State's borders:

> **(c) Additional uses**
>
> (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved or cancelled by the Administrator. * * *

7 U.S.C. 136v(c)(1). Sections 136v(c)(2) through (4) set out additional limitations on state-issued registrations. 7 U.S.C. 136v(c)(2)-(4).

In short, Section 136v provides that a State may prohibit the sale or use of any pesticide within its borders. Under specified conditions, a State may also allow a pesticide to be used within its borders for purposes other than those provided in the federal registration. A State may not, however, "impose * * * any requirements for labeling or packaging in addition to or differ-

ent from those required under this subchapter." 7 U.S.C. 136v(b).

2. *The Facts Of This Case.* Respondents alleged that they purchased two of petitioner's herbicide products, "Pursuit" and Prowl," based on representations contained in brochures and magazine advertisements, to control weeds on their Texas peanut farm. Br. in Opp. App. 2a-3a (Third Amended Petition). Those representations, according to respondents, "substantially differed from, went beyond and were extrinsic of the label on the Prowl® and Pursuit® containers." *Id.* at 3a. Respondents contended that the herbicides, "instead of controlling the weeds in a safe and effective manner as intended and as advertised, caused damage to [respondents'] peanut plants to the extent that the peanuts failed to properly grow and produce." *Ibid.* Respondents furthered alleged that they "would show that the herbicide damage prevented the peanuts from producing harvestable nuts which were to be expected under the circumstances for the crop year in question and which were similar to that produced by the fields which were not treated with a tank mixture combination of Prowl and Pursuit herbicide." Pet. App. 3a-4a.

On the basis of those allegations, respondents sought relief on three causes of action: (a) "strict liability in tort" under Texas common law on the theory that the products were "defective and unsafe for their intended purposes"; (b) breach of express and implied warranties contained in "non-label advertising and promotional material"; and (c) violations of Texas's Deceptive Trade Practices and Consumer Protection Act (DTPA), Tex. Bus. & Com. Code Ann. §§ 17.41 *et seq.* (West 2002), apparently based on alleged misrepresentations by petitioners about the products in their promotional materials. Br. in Opp. App. 1a, 4a-5a. The Texas

district court granted petitioner's motion for summary judgment "on the ground that each and all of [respondents'] claims are preempted by [FIFRA]." Pet. App. 25a. In a letter predating the judgment, the district judge stated that "I have concluded and find that [petitioner is] entitled to summary judgment as a matter of law as to each of [respondents'] claims as those claims are directly or indirectly related to the product's labeling and therefore preempted by FIFRA." *Id.* at 28a.

The Texas court of appeals reversed that judgment. Pet. App. 15a-24a. The court stated at the outset that "[a]ll of [respondents'] state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." *Id.* at 16a. The court apparently reached that conclusion based on its view that "[t]he off-label statements merely repeated information on the labels." *Id.* at 16a n.2. The court also observed that many courts had ruled that FIFRA's "preemption of state authority as to pesticide labels bars damage claims in state court by growers against pesticide manufacturers" because "allowing such a claim by a grower would be, in effect, permitting the state to impose label requirements 'in addition to or different from' the federally-approved label." *Id.* at 20a (quoting 7 U.S.C. 136v(b)). The court further noted, however, that "in actual fact, EPA, with Congress' approval, stopped evaluating pesticide efficacy for routine label approvals almost two decades ago." *Id.* at 21a. The court of appeals concluded that Congress could not have intended to preempt state-law efficacy claims after EPA ceased evaluating pesticide efficacy. *Id.* at 23a. It therefore held that "plaintiffs' state law claims relating directly or indirectly to labeling are not preempted by FIFRA because such

claims involve the efficacy of the products and not the risks to humans and the environment posed by the use of the product." *Id.* at 24a.

The Texas Supreme Court, on petition for review, affirmed the court of appeals' judgment. Pet. App. 14a. The supreme court, unlike the lower Texas courts, did not address the question whether or not petitioners' claims were "label-related." Instead, it concluded that the issue of preemption in this case could be resolved on the ground that Congress has authorized EPA "to choose NOT to regulate product labeling with respect to how well a product works." *Id.* at 1a-2a. The court stated:

> Simply put, the EPA does not regulate herbicide labels regarding how well a product works, and this includes if the product actually injures the crops it was intended to assist. Because of the EPA's choice not to regulate, and therefore because there are no labeling or packaging requirements regarding crop damage imposed under FIFRA, we conclude that state common-law claims about target area crop damage are not preempted. Thus, [respondents'] claims are not preempted.

Id. at 2a. The Texas Supreme Court accordingly affirmed the court of appeals' judgment remanding the case for further proceedings. See *id.* at 14a, 24a.

DISCUSSION

The petition for a writ of certiorari raises potentially important questions respecting the preemptive effect of Section 136v(b) of FIFRA. This case does not, however, provide the Court with an appropriate opportunity to address those issues. Most significantly, the Texas Supreme Court's judgment is not "final" for purposes of 28 U.S.C. 1257, and this Court accordingly

lacks jurisdiction to review it. Furthermore (and related to the jurisdictional defect), the Texas Supreme Court—which affirmed the court of appeals' judgment on the ground that Section 136v(b) categorically does not preempt lawsuits predicated on a pesticide's lack of efficacy because EPA does not regulate efficacy—has not resolved whether respondents' causes of action in this case actually entail the imposition of "any requirements for labeling or packaging in addition to or different from those required under [FIFRA]," within the meaning of Section 136v(b). The petition in this case accordingly does not provide a proper vehicle for addressing the scope of FIFRA preemption.

On the merits of the question of FIFRA preemption, the United States has, on two occasions, filed briefs as amicus curiae urging that Section 136v(b) categorically does not preempt state-law actions seeking compensation for injuries from pesticide use, including claims arising from crop damage. The United States has reexamined the position that it urged in those cases and has concluded that its arguments that FIFRA categorically does not preempt common law actions are incorrect. That position no longer represents the view of the United States. Rather, the United States submits that state-law damages claims are within the scope of Section 136v(b) where the state-created legal duty on which the suit is predicated would "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." 7 U.S.C. 136v(b).

1. *This Court Lacks Jurisdiction To Review The Interlocutory Decision Of The Texas Supreme Court.* Congress has granted this Court jurisdiction to review, by writ or certiorari, "[f]inal judgments or decrees rendered by the highest court of a State in which a

decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of * * * the United States." 28 U.S.C. 1257(a). "As a general matter, to be reviewed by this Court, a state-court judgment must be final 'as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Pierce County* v. *Guillen*, 123 S. Ct. 720, 728 (2003) (quoting *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997), and *Market Street R.R.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945)). The Texas Supreme Court's judgment in this case, which affirmed a court of appeals decision reversing a grant of summary judgment and remanding the case for further proceedings, is not final in that sense. See Pet. App. 14a, 24a.

Petitioner nevertheless invokes this Court's jurisdiction on the basis of this Court's decision in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), which recognizes that certain state-court judgments can be treated as final for jurisdictional purposes, even though further proceedings are to take place in the state courts. See *id.* at 477-483 (identifying four exceptions to the finality rule). In particular, petitioner relies (Pet. 1-3) on the "fourth *Cox* exception," which states that a state-court judgment may be treated as final

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or

> determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-483. See, *e.g.*, *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989).

Petitioner can satisfy the first condition because the company could indeed prevail on nonfederal grounds in the future proceedings. But petitioner cannot show that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting*, 420 U.S. at 482-483. Most fundamentally, the Texas Supreme Court did not reach the question whether, even if Section 136v(b) does apply to some efficacy-based claims, the legal duty under state law on which each of respondents' tort claims in this case is predicated would "impose * * * requirements for labeling * * * in addition to or different from those required under [FIFRA]," within the meaning of 7 U.S.C. 136v(b).

For example, to the extent respondents' claims depend on representations by petitioner at all, the complaint alleges that they were not made in product labels, but rather were made in "brochures and magazine advertisements." Br. in Opp. App. 2a-3a. Magazine advertisements, as well as many types of brochures, are not within FIFRA's express definition of "labeling." See 7 U.S.C. 136(p)(2). To the extent that any of the statements identified in respondents' complaint might nevertheless be found to constitute "labeling," then the result could be simply to exclude any such statement as a basis for liability under the

relevant cause of action, and not to require dismissal of the cause of action altogether. The same would be true if Section 136v(b) were held to preempt not only claims that would impose requirements "for" labeling, but also claims that are based on other statements (in advertising or elsewhere) that repeat statements in the label itself, as some courts have held. See, *e.g.*, *Kuiper* v. *American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997), cert. denied, 523 U.S. 1137 (1998).[1]

Thus, the resolution of questions concerning whether particular statements may be admitted into evidence or form the basis for liability under one or another of respondents' causes of action would not "be preclusive of any further litigation on the relevant cause of action," but rather would merely control[] the nature and character of, or determin[e] the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting*, 420 U.S. at 482-483. See *Pierce County*, 123 S. Ct. at 728 n.5 (judgment not final under fourth *Cox* exception because "respondents remain free to try their tort case without the disputed documents").

Furthermore, the Texas Supreme Court has already concluded, in a prior decision, that Section 136v(b) would not preempt a claim for breach of warranty, which is one of respondents claims here, if the claim does not depend on an alleged failure to provide adequate warnings in the labeling. See *Quest Chem. Corp.* v. *Elam*, 898 S.W.2d 819, 821 (1995); cf. *Cipollone* v.

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[1] Although the Texas Supreme Court stated that respondents "claim they relied on various labels and advertisements that specifically stated that Pursuit could be 'tank mixed' with Prowl," Pet. App. 2a, the Texas court of appeals stated that respondents "relied upon *off*-label magazine and brochure advertisements made by [petitioner] regarding Prowl and Pursuit, "*id.* at 16a (emphasis added). Respondents reiterate the latter position in this Court. See Br. in Opp. 1-2.

Liggett Group, Inc., 505 U.S. 504, 525-526 (1992) (plurality opinion) ("'requirement[s]' imposed by an express warranty claim are not 'imposed under State law,' but rather imposed *by the warrantor*"); *American Airlines* v. *Wolens*, 513 U.S. 219, 228-229 (1995); cf. *Grenier* v. *Vermont Log Bldgs., Inc.*, 96 F.3d 559, 564 (1st Cir. 1996) (breach of express warranty claim based on inaccurate statement in labeling preempted); *Welchert* v. *American Cyanamid, Inc.*, 59 F.3d 69, 71-73 (8th Cir. 1995) (breach of express warranty claim preempted where EPA required to include on the label some statement on the subject). And a claim based on strict liability, another of respondents' claims in this case, need not be based on statements in labeling at all.

Finally, even where state law does impose requirements for labeling, that law is preempted under 7 U.S.C. 136v(b) only if the requirements it imposes are "in addition to or different from" any requirements imposed by FIFRA itself. Thus, in *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 486-492 (1996), for example, the Court unanimously held a provision of the Medical Device Amendments of 1976 (MDA), Pub. L. No. 94-295, 90 Stat. 539, which bars any state-law "requirement" that is "different from, or in addition to," one applicable to the device under the MDA, 21 U.S.C. 360k(a)(1), does not bar common law tort claims that are based on a violation of federal regulations—*i.e.*, where federal regulations furnish the standard of care. See *Lohr*, 518 U.S. at 494-497; see also *id.* at 513 (O'Connor, J., concurring in part and dissenting in part) (Section 360k(a) does not preempt claims that seek damages for "alleged violation of federal requirements"). Those issues, too, could arise in the Texas courts in any further proceedings on respondents' claims.

If this Court were to reverse the Texas Supreme Court's ruling that respondents' claims are not preempted because "the scope of FIFRA's preemption is dependent on what the EPA regulates" and "EPA does not regulate a product's labeling claims" respecting whether a product will be toxic to the crop, Pet. App. 14a, the Court's decision would not terminate litigation on respondents' causes of action. Respondents would be entitled to make, on remand, any of the foregoing arguments that have been adequately preserved.

Respondents preserved at least some, if not all, of those arguments in the Texas Supreme Court. They devoted a section of their brief to the contention: "alternatively, the court of appeals improperly held that all of respondents' claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." Respondents' Tex. Sup. Ct. Br. 13-17 (capitalization of argument heading omitted). In that section of their brief, respondents contended that the statements on which they relied were not contained in product labels (see also *id.* at 2), and also relied on cases concluding that claims for breach of express warranty are not preempted.

Petitioner appears to concede that respondents properly preserved this set of arguments. See Pet. Reply Br. 3 n.3 (noting that respondents challenged the court of appeals' characterization of their claims in the Texas Supreme Court). Petitioner contends, however, that the Texas Supreme Court could not—and cannot—reach the issue of whether respondents' claims concern labeling because the Texas Court of Appeals found, as a matter of fact, that "[a]ll of plaintiffs' state law claims relate directly or indirectly to the product label." *Id.* at 2 (emphasis and quotation marks deleted). Accordingly to petitioner:

> Under the Texas Constitution, this factual finding by the state court of appeals "shall be conclusive," and therefore cannot be reviewed by the Texas Supreme Court.

Id. at 3 (quoting Tex. Const. Art. V § 6(a)).

Petitioner is mistaken in its view of Texas law. The questions whether, for purposes of FIFRA, a plaintiff's claims "relate" to a product label (or, more precisely under 7 U.S.C. 136v(b), whether the claims would "impose" any "requirements for labeling" that are in addition to or different from those required under FIFRA) —and what significance that characterization has for purposes of federal preemption—present questions of federal law that have themselves divided the federal courts of appeals. See, *e.g.*, *Kuiper*, 131 F.3d at 662-663; see also *Eyl* v. *Ciba-Geigy Corp.*, 650 N.W.2d 744, 754 (Neb. 2002), petition for cert. pending, No. 02-1500 (filed Apr. 10, 2003). The Texas Supreme Court would not be precluded by the Texas Constitution from addressing those legal questions following a remand.[2]

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[2] Indeed, this case does not implicate the restriction contained in the Texas Constitution at all. The Texas Supreme Court reviewed a court of appeals decision that reversed a district court's entry of summary judgment. See Pet. App. 2a-3a. "The very principle upon which summary judgments are founded is that the record presents no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *City of Grand Prairie* v. *City of Irving*, 441 S.W.2d 270, 273 (Tex. Civ. App. 1969) (no writ). A district court's conclusion that no genuine issue of material fact is in dispute is a legal conclusion that is subject to appellate review. The Texas Supreme Court routinely reverses decisions of courts of appeals that a material issue of fact does or does not exist. See, *e.g.*, *Callahan & Assocs.* v. *Orangefield Indep. Sch. Dist.* 92 S.W.3d 841, 842 (Tex. 2002). Respondents were entitled to challenge the district court's judgment on the basis that material facts were in dispute, and they would be entitled, on remand, to renew those or other remaining legal arguments in

Because reversal of the Texas Supreme Court's decision would not be "preclusive of any further litigation on the relevant cause[s] of action," but instead would "merely control[] the nature and character of * * * the state court proceedings still to come," *Cox Broadcasting*, 420 U.S. at 482-483, the decision does not meet the minimum requirements of the fourth *Cox* test.[3]

2. *FIFRA Preempts State-Law Damages Actions That Impose Labeling And Packaging Requirements In Addition To, Or Different From, Those That FIFRA Imposes.* On two occasions in the past, the United States has filed briefs as amicus curiae in the lower courts taking the position that FIFRA does not preempt state-law actions seeking compensation for damages arising from pesticide use and that, in any event, FIFRA does not preempt claims relating to pesticide efficacy. See U.S. Amicus Curiae Br., *Hart* v. *Bayer Corp.* (5th Cir. filed Mar. 1999) (No. 98-60496); U.S. Amicus Curiae Br., *Etcheverry* v. *TRI-AG Serv. Inc.* (Cal. filed Mar. 1999) (No. S072524). Those briefs have been widely circulated and the arguments therein have been noted in other lower courts. See, *e.g.*, Pet. App. 22a.

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defense of the court of appeals' reversal of that judgment. See Resp. Supp. Br. 1-3.

[3] If the Court were to conclude that at least one (but not all) of respondents' causes of action would be preempted if it reversed the decision of the Texas Supreme Court on the particular ground on which that court relied, the question would then arise whether 28 U.S.C. 1257 should be construed (in the manner of Fed. R. Civ. P. 54(b)) to permit a judgment that is not final as to the entire case to be regarded as final with respect to the disposition of particular claims. Cf. *Pierce County*, 123 S. Ct. at 726, 728-729 (treating as final one of two separately filed suits that were consolidated on appeal).

The United States urged in those briefs that, while Congress sought "to prevent state administrative bodies from issuing labeling regulations that conflicted with federal requirements," Congress did not express an intent "to deprive injured persons of state-law damages remedies." U.S. Amicus Curiae Br. at 9, *Etcheverry*, *supra* (No. S072524). The California Supreme Court rejected the United States' submission. *Etcheverry* v. *TRI-AG Serv. Inc.*, 993 P.2d 366 (2000). The United States has reexamined the position that it urged in *Etcheverry* in light of the ruling by the California Supreme Court in that case, as well as the subsequent rulings of other courts, and it has concluded that its position in *Etcheverry* that FIFRA categorically does not preempt common law tort suits or other damages actions is incorrect. In the United States' view, just as Section 136v(b) applies to requirements imposed in a law enacted by a state legislature or regulation promulgated by a state agency, it applies to requirements imposed in the form of a duty or standard of care in a tort action.[4]

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[4] Most federal courts of appeals and state courts of last resort have held that Section 136v(b) preempts state-law failure-to-warn actions, reasoning that such actions are predicated on labeling "requirements" within the meaning of FIFRA. See, *e.g.*, *Netland* v. *Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), cert. denied, 123 S. Ct. 415 (2002); *Etcheverry*, *supra*; see also Pet. 10 n.2 (collecting additional cases); *Eyl* v. *Ciba-Geigy Corp.*, 650 N.W.2d 744, 754 (Neb. 2002) (same), petition for cert pending, No. 02-1500 (filed Apr. 10, 2003). But the Montana Supreme Court has held otherwise, concluding that "Congress intended the term 'requirements' in § 136v(b) of FIFRA to mean enactments of positive law by legislative or administrative bodies, not state law damage actions." *Sleath* v. *West Mont. Home Health Servs., Inc.*, 16 P.3d 1042, 1053 (Mont. 2000), cert. denied, 122 S. Ct. 40 (2001); accord *Brown* v. *Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999), review denied, 6 P.3d 1098 (Or. 2000).

The California Supreme Court in *Etcheverry* obtained guidance from this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), which held that provisions of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. 1331 *et seq.*, proscribing the imposition of any "requirement or prohibition * * * under State law," encompasses legal duties applied in common-law tort actions as well as affirmative state laws and regulations. See, *e.g.*, *Etcheverry*, 993 P.2d at 370-371 (quoting *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995) ("There is no notable difference between the language in the 1969 Cigarette Act [preempting state common-law tort actions based on label claims] and the language in FIFRA.").

The California Supreme Court additionally concluded that this Court's decision in *Medtronic, Inc.* v. *Lohr*, *supra*, supports the conclusion that FIFRA preempts state-law damage claims. *Etcheverry*, 993 P.2d at 373-374. This Court ruled in *Medtronic* that the Food and Drug Administration's (FDA's) approval of a pacemaker under the MDA, did not, under the particular circumstances presented, preempt a state-law action alleging that the pacemaker was improperly designed. Separate opinions in that case recognized, however, that the MDA's provisions prohibiting the States from establishing any inconsistent "requirement" that "relates to the safety or effectiveness of the device," 21 U.S.C. 360k(a)(2), could preempt state-law damage suits. See *Medtronics*, 518 U.S. at 504 (Breyer, J., concurring in part); *id.* at 510-512 (O'Connor, J., concurring in part and dissenting in part); see also *id.* at 502 (opinion of Stevens, J.); cf. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 867 (2000).

The United States agrees and submits that the legal standard applied in a state-law damages action may

"impose" a "requirement[]" for labeling or packaging within the meaning of 7 U.S.C. 136v(b). As the California Supreme Court recognized in *Etcheverry*, however, the scope of FIFRA's preemptive effect in a tort suit depends on the specific nature of the state-law claims at issue. 993 P.2d at 376-378. See, *e.g.*, *Cipollone*, 505 U.S. at 523 ("we must look to each of petitioner's common-law claims to determine whether it is in fact pre-empted"). The inquiry specifically depends on an analysis of whether the particular state-law claim would result in "impos[ing] or continu[ing] in effect" any "requirements for labeling or packaging" that are in addition to or different from "requirements" that FIFRA itself imposes. Because the Texas Supreme Court has not conducted such an evaluation in this case, and neither the record nor the precise nature of respondents' claims is yet fully developed, the United States takes no position at this time with respect to whether, or to what extent, respondents' claims are preempted.[5]

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[5] This Court currently has pending before it a petition for a writ of certiorari in *Eyl* v. *Ciba-Geigy Corp.*, No. 02-1500 (filed Apr. 10, 2003), which presents the question whether, and to what extent, FIFRA preempts state-law damage actions. The petition in *Eyl* seeks review of a final judgment of the Nebraska Supreme Court that reversed a personal injury judgment predicated on pesticide exposure. Petitioner Eyl sought damages from a pesticide registrant, Ciba-Geigy Corporation, based on his exposure to the herbicide "Pramitol 5PS" while working as a city maintenance worker. Pet. App. at 1a-2a, *Eyl*, *supra* (No. 02-1500). The registrant argued that "Eyl's claims are labeling based and preempted by [FIFRA]." *Id.* at 2a. The Nebraska Supreme Court ruled that "FIFRA applies to preempt Eyl's failure-to-warn claims," reversing the district court judgment with directions to dismiss. *Ibid.*

CONCLUSION

The petition for a writ of certiorari in this case should be denied.

Respectfully submitted.

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No. 02-367

IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

PETITIONER'S THIRD SUPPLEMENTAL BRIEF: RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PETITIONER'S THIRD SUPPLEMENTAL BRIEF[1]

Pursuant to Sup. Ct. R. 15.8, Petitioner American Cyanamid Company hereby submits this Third Supplemental Brief, which responds to the Brief for the United States As Amicus Curiae ("U.S. Br."), filed May 30, 2003.

DISCUSSION

The Government's brief, which the Court invited by order of November 12, 2002, acknowledges that the petition in this case "raises potentially important questions respecting the preemptive effect of Section 136v(b) of FIFRA." U.S. Br. at 8. Further, the Government nowhere disputes that the significant federal pre-emption question conclusively addressed in the opinion below – whether agricultural crop injury claims are excluded from the widely accepted principle that FIFRA pre-empts labeling-related damages claims – continues to divide the Texas Supreme Court and California Supreme Court, and also the Texas Supreme Court and U.S. Court of Appeals for the Fifth Circuit. After almost seven months of consideration, however, the Government has filed a brief which takes "no position at this time" on the merits of this frequently recurring "exception to pre-emption" question, whose prompt resolution is vital to farmers, the pesticide industry, and the agricultural economy. *Id.* at 19. Instead, the brief asserts that the opinion below "is not 'final' for purposes of 28 U.S.C. 1257," and as a result, that this case does not provide the Court with "an appropriate opportunity" for review. *Id.* at 8.

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[1] The amended Rule 29.6 corporate disclosure statement filed with Petitioner's Supplemental Brief remains accurate.

We respectfully disagree. The Texas Supreme Court rendered a final decision holding "that state common-law claims about target area crop damage are not preempted" by FIFRA. Pet., App. at 2a. As previously discussed, this final state court decision on the federal pre-emption issue falls squarely within the fourth category of "cases in which the Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). This is because (i) "the federal issue has been finally decided in the state courts;" (ii) "reversal of the state court on the federal issue would be preclusive of any further litigation *on the relevant cause of action*;" and (iii) "refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-83 (emphasis added). *See* Pet. at 1-3; Petitioner's Reply Br. at 1-4; Br. of CropLife America as *Amicus Curiae* in Support of Petitioner at 2-8.

This Court has recognized that "the power of [a] state court to proceed in the face of [a] preemption claim" is "an issue separable from the merits and ripe for review . . . particularly 'when postponing review would seriously erode the national . . . policy' " at issue. *Cox*, 420 U.S. at 483 (referring to and quoting *Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963)). As a result, the Court on numerous occasions has granted immediate review of "interlocutory" state court pre-emption decisions. *See* Br. of CropLife America at 4-7 (collecting cases). The Government's brief fails to acknowledge these cases.

Unless the Court reviews at this time the important FIFRA pre-emption question decided by the Texas Supreme Court and raised by the petition in this case, Petitioner, and other pesticide manufacturers, formulators, or distributors which sell their products in Texas, the nation's second largest

agricultural state, will be compelled to "face further proceedings in the state courts which the state courts have no power to conduct." *Construction Laborers*, 371 U.S. at 550. That would continue to seriously erode the congressional policy underlying § 136v(b) of FIFRA, which is "to ensure a uniform nationwide approach to pesticide labeling." U.S. Br. at 5.

1. The Government's brief does not deny that "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. *See* Petitioner's Reply Br. at 4-6; Br. of CropLife America at 4. According to the Government, however, the Court lacks jurisdiction because "petitioner cannot show that 'reversal of the state court on the federal issue would be preclusive of any further litigation on the *relevant cause of action*.' " U.S. Br. at 11 (quoting *Cox*, 420 U.S. at 482-83) (emphasis added). This is plainly incorrect. The "relevant cause[s] of action" for purposes of the federal issue (i.e., the FIFRA pre-emption question) decided by the Texas Supreme Court are Respondents' labeling-related causes of action, no matter how denominated (e.g., strict liability, breach of implied or express warranties, violation of the Texas Deceptive Trade Practices Act). The labeling-related causes of action are the "relevant cause[s] of action" because, as the Government's brief agrees, "FIFRA preempts state-law damages actions that impose labeling and packaging requirements in addition to, or different from, those that FIFRA imposes." U.S. Br. at 16 (capitalization of argument heading omitted). By its very nature, the federal pre-emption doctrine precludes a plaintiff from pursuing state law causes of action that conflict with federal law. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-24 (1992). Therefore, if this Court grants the petition for certiorari and then reverses the Texas Supreme Court's pre-emption holding, that *necessarily* "would be preclusive of any further litigation on the relevant cause[s] of

action" (i.e., on the labeling-related causes of action). *Cox*, 420 U.S. at 482-83.

According to the Government's brief, reversal of the federal pre-emption opinion below would not be preclusive because "[t]he [Texas] supreme court, unlike the lower Texas courts, did not address the question whether or not [Respondents'] claims were 'label-related.' " U.S. Br. at 8. To the contrary, that is *exactly* what the state supreme court did, albeit implicitly:

First, as the Government's brief explains, the state court of appeals explicitly affirmed at the outset of its opinion that the "off-label" advertising statements on which all of Respondents' causes of action are based "merely repeated information on the [herbicide labels]," and as a result, affirmed that "[a]ll of [Respondents'] state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." Pet., App. at 16a & 16a n.2; *see* U.S. Br. at 7. Yet, the court of appeals held that because those labeling-related claims involve agricultural crop damage, they are not pre-empted. By affirming this court of appeals judgment, the Texas Supreme Court implicitly agreed that Respondents' causes of action are labeling-related.

Second, the Government's brief overlooks a crucial point underlying the Texas Supreme Court's pre-emption analysis: In reaching its conclusion that FIFRA does not pre-empt Respondents' claims, the court indicated that "it is not the *breadth of preemption*, but rather the breadth of the congressionally created *exception to express preemption* that determines the outcome." Pet., App. at 1a (emphasis added). The state supreme court did not have to "struggle to determine the breadth of federal preemption" under FIFRA because, as the court explained, it previously had held, consistent with the overwhelming majority of federal and state cases, that FIFRA pre-empts "claims relating directly or

indirectly to labeling." *Id.* at 13a, 14a (quoting *Quest Chem. Corp.* v. *Elam,* 898 S.W.2d 819, 820 (1995)). Instead, the court undertook to "determine the breadth . . . of an exception to *that preemption*" (i.e., to FIFRA pre-emption of *labeling-related* claims). *Id.* at 14a (emphasis added). In light of this approach, the court's holding that there is an "exception to express preemption" for crop damage claims necessarily recognizes that Respondents' causes of action are labeling-related. Otherwise, the state supreme court would have been rendering an advisory opinion, which it cannot do. *See Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) ("Texas courts, like federal courts, have no jurisdiction to render such [advisory] opinions.").

Indeed, it is reasonable to infer from the opinion below that the Texas Supreme Court implicitly affirmed, consistent with the explicit opinions of the lower Texas courts, that *all* of Respondents' claims (i.e., causes of action) are labeling-related. For example, rather than attempting to distinguish its holding in *Quest Chem. Corp.* v. *Elam,* that FIFRA pre-empts "claims relating directly or indirectly to labeling," on the ground that some or all of Respondents' claims are not labeling-related, the court explained that "[t]he fundamental difference is that *Quest* involved a claim for personal injury while this case involves a claim for target crop damage." Pet., App. at 13a.

The Government's brief argues that the Texas Supreme Court has not addressed whether Respondents' claims are "label-related" because it supposedly "has not resolved whether respondents' causes of action in this case actually entail the imposition of 'any requirements for labeling or packaging in addition to or different from those required under [FIFRA],' within the meaning of Section 136v(b)." U.S. Br. at 8, 9; *see id.* at 15. In other words, according to the Government, unless a claim is found to be pre-empted by § 136v(b), it cannot be found to be labeling-

related. The Government fails to reconcile this contention, however, with the opinion of the state court of appeals, which the Texas Supreme Court affirmed. As indicated above, the Government's brief acknowledges the court of appeals "stated at the outset that '[a]ll of [respondents'] state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing.' " U.S. Br. at 7 (quoting Pet, App. at 16a). The court of appeals then "held that 'plaintiffs' state law claims *relating directly or indirectly to labeling* are not preempted by FIFRA because such claims involve the efficacy of the products and not the risks to humans and the environment posed by the use of the product." *Id.* at 7-8 (quoting Pet., App. at 24a) (emphasis added). Thus, contrary to the Government's contention that the lower court could not have determined that Respondents' claims are labeling-related without finding them to be pre-empted, the court of appeals did just that by holding that even though Respondents' claims *all relate directly or indirectly to the labeling involved in this case,* they are not pre-empted.

The Texas Supreme Court adopted this approach when it held that claims involving crop damage are excluded from FIFRA pre-emption of labeling-related claims. Thus, the Texas Supreme Court already has implicitly affirmed that all of Respondents' causes of action are labeling-related. As a result, if this Court grants review and reverses the lower court's holding that causes of action involving crop damage are excluded from FIFRA pre-emption, there will be nothing remaining for the lower court to do except mandate dismissal of this case.

2. Even if the state supreme court had construed only some of Respondents' claims as labeling-related, that would be enough to confer jurisdiction under § 1257. Nothing in *Cox*'s fourth category requires that reversal of the state court's ruling on the federal issue must terminate the entire litigation. Instead, as the Government's brief repeatedly

indicates, the final decision on the federal issue must only be "preclusive of any further litigation on the *relevant* cause[s] of action" (i.e., on the labeling-related claims). *Cox*, 420 U.S. at 482-83 (emphasis added). *Cf. Pierce County v. Guillen*, 123 S. Ct. 720, 728-29 (2003).

Along the same lines, the Government's jurisdictional arguments fail to take into account Respondents' concession in their Brief in Opposition that at least some of their claims are labeling-related. *See* Respondents' Brief in Opposition at 1-2. Because reversal of the Texas Supreme Court's opinion would be preclusive of any further litigation at least as to those admittedly labeling-related claims, that is enough to invoke the Court's jurisdiction under § 1257. *See* Petitioner's Reply Br. at 4 n.4.

The Government's brief asserts, however, that "[i]f the Court were to conclude that at least one (but not all) of respondents' causes of action would be preempted if it reversed the decision of the Texas Supreme Court . . . the question would then arise whether 28 U.S.C. 1257 should be construed (in the manner of Fed. R. Civ. P. 54(b)) to permit a judgment that is not final as to the entire case to be regarded as final with respect to the disposition of particular claims." U.S. Br. at 16 n.3. *Cox* (which restated the holdings of earlier cases on § 1257 jurisdiction) already answers this question in the affirmative by limiting the "finality" analysis to whether "the *federal* issue has been finally decided" and whether "reversal of the state court on the *federal* issue would be preclusive of any further litigation on the *relevant* cause[s] of action." *Cox*, 420 U.S. at 482-83 (emphasis added); *see, e.g., Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964) ("The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein on the cross-petition does not render the judgment of the Ohio Supreme Court on the issue

here considered and decided nonfinal or unappealable within the meaning of 28 U.S.C. § 1257.").

3. Rather than adhering to this Court's "intensely 'practical' approach" to finality issues under § 1257, the Government's brief advocates one that is immensely impractical. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). Under the Government's constricted view of finality in this case, this Court would have no jurisdiction to resolve the deep split of authority on the important federal pre-emption question presented unless and until Petitioner were to (i) endure a trial before a Texas state court jury on failure-to-warn product liability claims which the lower courts already have determined are labeling-related, and which Cyanamid contends are pre-empted; (ii) suffer an adverse judgment; and then (iii) relitigate the FIFRA pre-emption issue in the Texas appellate courts and obtain a Texas Supreme Court opinion which *explicitly* affirms that Respondents' claims are labeling-related but again holds that because they involve crop damage, they are not pre-empted. *See* Br. of CropLife America at 7-8. This *costly, time-consuming, repetitious, and very uncertain procedure* that the Government's brief maintains is required for obtaining a "final" state court federal pre-emption ruling which qualifies for § 1257 jurisdiction could not have been what the Court intended when it explained in *Cox* that "the requirement of finality is to be given a 'practical rather than a technical construction.' " *Cox*, 420 U.S. at 478 n.7 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

4. The Government's brief notes the pending certiorari petition in *Eyl v. Ciba-Geigy Corp.*, No. 02-1500 (filed April 10, 2003). U.S. Br. at 19 n.5. As discussed in Petitioner's Second Supplemental Brief, the petition in *Eyl* requests the Court to review, despite the near unanimity among the lower courts, the basic, well established principle that § 136v(b) of FIFRA expressly pre-empts failure-to-warn

and other labeling-related damages claims. There is no reason for the Court to grant the *Eyl* petition. Indeed, the Government's brief here provides the Court with even more reason to deny the *Eyl* petition by advising the Court that the "United States has reexamined" the categorical position against FIFRA tort pre-emption that it advocated as *amicus curiae* in *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366 (Cal. 2000), and that it "has concluded" that its *Etcheverry amicus* position (a position upon which the *Eyl* petition heavily relies) is "*incorrect*" and "*no longer represents the view of the United States*." U.S. Br. at 9 (emphasis added); *see also id.* at 17. Moreover, the Government's brief does not dispute that if the Court were to grant review in *Eyl* and uphold the lower court's affirmation of FIFRA pre-emption in that personal injury case, the crop damage "exception to pre-emption" question presented here would remain completely unresolved. *See Petitioner's Second Supplemental Brief.* This is all the more reason why the Court should deny review in *Eyl* and grant review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

PETITIONER'S FOURTH SUPPLEMENTAL BRIEF

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PETITIONER'S FOURTH SUPPLEMENTAL BRIEF[1]

Pursuant to Sup. Ct. R. 15.8, Petitioner American Cyanamid Company wishes to alert the Court to a just-issued Fifth Circuit opinion which *directly conflicts* with the Texas Supreme Court's *Geye* opinion below.

The farmers in *Dow AgroSciences LLC v. Bates*, No. 02-10908, 2003 WL 21221722 (5th Cir. June 11, 2003) – like the Respondent farmers here – claimed that their Texas peanut crops suffered herbicide-related injuries such as stunted growth and inhibited foliage development. Further, as is the case here, the farmers in *Dow AgroSciences* alleged that they had been misled by "off-label" promotional statements and sought damages based on various Texas state law causes of action, including breach of implied and express warranties, strict liability, and violation of the Texas Deceptive Trade Practices Act. *See id.*, at *1; *compare* Pet., App. at 2a.

Unlike the Texas Supreme Court's opinion in *Geye*, however, the federal court of appeals held that "state labeling requirements related to product effectiveness are . . . within the scope of FIFRA's express preemption clause," 7 U.S.C. § 136v(b). *Dow AgroSciences,* 2003 WL 21221722, at *4. *Unlike* the state supreme court's opinion below, the court of appeals held that "because FIFRA's express preemption clause is self-executing, FIFRA preemption of performance-related state law claims is *not dependent* upon the existence of conflicting EPA regulations." *Id.* at *8 (emphasis added). And *unlike* the opinion below, the court of appeals held that

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[1] The amended Rule 29.6 corporate disclosure statement filed with Petitioner's Supplemental Brief remains accurate.

§ 136v(b) "expressly preempted the farmers' state law claims." *Id.* at *4.

In *Dow AgroSciences* the herbicide manufacturer "filed for declaratory relief in anticipation of being sued in state court" by "29 Texas peanut farmers." *Id.*, at *1, *3. The manufacturer "sought, among other things, a judicial declaration that [§ 136v(b) of FIFRA] preempts the farmers' state law claims." *Id.*, at *1. The farmers counterclaimed with their state law damages claims. *Id.*

Citing the Texas Supreme Court's adverse pre-emption opinion in *Geye*, the Fifth Circuit court of appeals noted that the manufacturer's "choice of a federal court was *no doubt a strategic one*." *Id.*, at *3 n.4 (emphasis added). In other words, the court of appeals confirmed that because of *Geye*, the question of whether Texas farmers' crop injury claims are subject to FIFRA pre-emption currently depends upon whether those claims are brought in a Texas federal district court or a Texas state court.

The court of appeals opinion discusses in detail why it rejects the farmers' argument, virtually identical to the Texas Supreme Court's conclusion in *Geye*, "that FIFRA preemption of [product] performance-related claims requires the existence of conflicting EPA enactments." *Id.*, at *5. In particular, the court of appeals opinion explains as follows:

> . . . FIFRA's text does *not* define the scope of FIFRA's preemption clause to be a function of existing EPA regulations . . . .
>
> * * *
>
> The scope of FIFRA's express preemption clause is defined by the simple text of § 136v. *That the EPA has not elected to impose labeling regulations concerning product effectiveness does not alter the plain meaning of § 136v(b) nor avoid preemption of a claim that has the effect of imposing labeling*

> *requirements*. For a state to create a labeling requirement by authorizing a claim linked to the specifications of a label, even where the EPA has elected not to impose such labeling requirements, *would clearly be to impose a requirement "in addition to or different from those" required under FIFRA. See* 7 U.S.C. § 136v(b). Thus, the farmers' claims, including those which challenge [the herbicide's] effectiveness, *are within the scope of FIFRA's express preemption clause* if they are related to the content of the [herbicide] label.

Id., at *5 (emphasis added).

The court then indicated that a "claim's relatedness to a product label may be determined *simply by reference to the party's pleadings*." *Id.*, at *6 (citing *Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 399 (5th Cir. 1999) (emphasis added).[2] On that basis, the court found that the farmers' strict liability and negligence claims were "a disguised claim for failure to warn," and therefore pre-empted by § 136v(b). *Id.*, at *7, *8. As to the farmers' breach of warranty, fraud, and Texas Deceptive Trade Practices Act claims, the court held that they were pre-empted because there was no evidence demonstrating that the alleged "off-label" representations upon which they were based "differed or strayed" or "deviated from the contents of the [herbicide] label." *Id.*, at *6, *7. Similarly, as Petitioner American Cyanamid has emphasized, the lower Texas state courts determined here that "[t]he off-label statements merely repeated information

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[2] This is in stark contrast to the Solicitor General's assertion in his *amicus* brief here that determining whether a claim is labeling-related "present[s] questions of federal law." U.S. Amicus Br. at 15.

on the labels," and therefore, that "[a]ll of [Respondents'] claims relate directly or indirectly to the product label." Pet., App. at 16a & n.2.

The Fifth Circuit's opinion criticizes as "wholly unnecessary and inappropriate" what it refers to as the Texas Supreme Court's attempt in its opinion below to "import notions of implied preemption" into what should have been an express pre-emption analysis based solely on the plain language of § 136v(b). *Dow AgroSciences*, 2003 WL 21221722, at *5. The court of appeals notes in this regard that instead of focusing on "the scope of FIFRA's express preemption clause," the state supreme court discusses only a supposed "exception to preemption" for efficacy-related claims. *Id.* at *5 & n.13; *see also Anderson v. Dow AgroSciences LLC*, No. CIV-01-1939-HE, 2003 WL 21182933, at *3 n.12 (W.D. Okla. May 14, 2003) (indicating that "*given the scope of the FIFRA preemption* as interpreted by the Tenth Circuit . . . and most other courts, the distinction [drawn in *Geye* for efficacy-related claims] is not dispositive here") (emphasis added).[3]

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[3] Although it justifiably took issue with the Texas Supreme Court's analysis, the federal court of appeals incorrectly asserted that "*Geye* proceeds from the assumption that the claims at issue did not relate to product labeling." *Dow AgroSciences*, 2003 WL 21221722, at *5. As Petitioner has previously discussed, exactly the opposite is true. *See* Petitioner's Third Supplemental Br. at 4-7. Indeed, if the state supreme court had concluded, or even assumed, that none of Respondents' claims are labeling-related (despite the lower Texas courts' explicit determination that *all* of Respondents' claims are labeling-related and Respondents' concession that at least some of their claims are labeling-related), the court would have been rendering an advisory opinion. *See id.* at 5.

The *Dow AgroSciences* opinion demonstrates that there is a deep, well defined, irreconcilable split of authority between the Texas Supreme Court and the Fifth Circuit (as well as between the Texas Supreme Court and the California Supreme Court) on the important, recurring question of whether agricultural crop injury claims are encompassed by FIFRA pre-emption. Only this Court can resolve the conflict by granting review in *American Cyanamid v. Geye*.

CONCLUSION

For the foregoing reasons, and those presented in the petition, reply brief, three previous supplemental briefs, and CropLife America *amicus* brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMERICAN CYANAMID COMPANY,

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v.

TERRY GEYE and BRANDON GEYE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO PETITIONER'S FOURTH SUPPLEMENTAL BRIEF

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RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO PETITIONER'S FOURTH SUPPLEMENTAL BRIEF

Until now, respondents have not felt compelled to respond to the deluge of extra paper foisted on the Court by petitioner. Although purportedly filed to bring to this Court's attention a recent Fifth Circuit decision (that could easily be explained in a paragraph or two), petitioner's **fourth** supplemental brief goes on for four pages rehashing arguments made in its five previous filings. Two of petitioner's statements, however, warrant a brief response because of their potential for confusion concerning the procedural posture of this case.

First, petitioner points to the Fifth Circuit's holding that the fraud, breach of warranty, and Texas Deceptive Trade Practices Act claims at issue there were preempted by FIFRA because, in that case, there was no evidence that the claims were based on "off-label" representations that differed from claims made on the label. Pet's Fourth Supp. Br. 3. But, **in this case**, as both we and the Solicitor General have previously explained (Opp. 1-2, 2a-3a; Gov't Br. 6), the Geyes specifically maintain that petitioner did in fact make off-label representations that are wholly unrelated to the content of the product label. This fact not only may bear on the preemption analysis, but, more importantly for present purposes, it demonstrates that the decision below is not "final" under 28 U.S.C. § 1257(a). That is so because the Geyes' non-label claims would have to be considered on remand even if this Court were to reverse the Texas Supreme Court's decision below on the question presented in the petition.

Second, petitioner buries in a footnote the only aspect of the Fifth Circuit's decision that bears on whether this case is "cert-worthy." The Fifth Circuit noted that the decision of the

Texas Supreme Court below "proceeds from the assumption that the claims at issue did not relate to product labeling." *See* Pet's Fourth Supp. Br. 4 n.3 (quoting *Dow AgroSciences LLC v. Bates*, __ F.3d. ___, 2003 WL 21221722, at *5 (5th Cir. June 11, 2003)). As the Solicitor General has demonstrated in detail (Gov't Br. 9-16), the characterization of the Geyes' claims as not label-based is accurate, at the very least with respect to those claims that focus on petitioner's off-label representations. Once again, that fact dooms the petition because it demonstrates that this Court lacks jurisdiction to review the Texas Supreme Court's decision under 28 U.S.C. § 1257(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

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